(25,666)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 836.

SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

FRANK R. STEWART.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Page
Caption	a
Proceedings in the superior court of Arizona in and for Maricopa county	1
Complaint	1
Summons and sheriff's return	7
Transcript of record from the district court of the United States for the district of Arizona	9
Order continuing hearing on demurrer	9
Order of submission of demurrer	10
Order assigning cause for hearing	10
Order sustaining demurrer, &c	11
Order as to filing amended answer, &c	12
Defendant's second amended pleas and answer	13
Exhibits A, B, and C—Live-stock shipping order contracts and bills of lading	23
Answer	29
Reply to second amended pleas and answer	41
Reply to second plea	49

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 8, 1917.

	Page
Answer	54
Order sustaining demurrer to defendant's pleas involved, &c.	69
Minutes of trial	70
Motion for directed verdict	75
Verdict	78
Order extending time to prepare and file bill of exceptions	78
Verdict	79
Judgment	80
Bill of exceptions	81
Testimony of Frank R. Stewart	82
James Ford	88
C. A. Whitfield	94
C. E. Connor	95
James Ford (recalled)	96
Frank H. Whitten	97
R. H. Field	103
Frank R. Stewart	105
James Ford (recalled)	106
Frank H. Whitten (recalled)	106
R. H. Field (recalled)	107
Dr. A. N. Gurley	107
Offers of evidence, &c.	112
Testimony of William Wilson	113
Horace W. Howard	122
O. M. Shreeve	124
A. R. Gatter	126
William H. Francis	128
C. S. Norman	129
Garfield Christiensen	132
J. J. Casey	132
George Davis	138
Frank Witkosky	140
Ed. Peterson	141
Millard Peterson	141
F. D. Martin	142
M. E. McKirahan	143
C. S. Norman (recalled)	144
Frank R. Stewart (recalled)	144
Frank E. Whitten (recalled)	145
James Ford (recalled)	146
Vernon Ford (recalled)	147
Instructions to jury requested by plaintiff	148
Instructions to jury requested by defendant	152
Instructions of court to jury	161
Defendant's exception to refusal to give certain instructions	177
Defendant's Exhibits 4, 5, and 2—(Not set out)	187
Defendant's Exhibit No. 6—Night letter, Frank R. Stewart to R. H. Fields, July 3, 1913	187
Live-stock shipping order contract and bill of lading	188
Defendant's Exhibit No. 7—Portion of train sheet, dated July 4, 1913	189
Order granting time to prepare and file bill of exceptions	189

	Page
Stipulation as to bill of exceptions	190
Notice of filing bill of exceptions	191
Order settling bill of exceptions	192
Assignment of errors	193
Petition for writ of error	229
Order allowing writ of error, &c.	231
Bond on writ of error	233
Præcipe for transcript and service	236
Order enlarging time to file record, &c.	238
Clerk's certificate	239
Writ of error	241
Citation and service	243
Order of submission	249
Opinion. Gilbert, J.	251
Judgment	259
Order denying petition for rehearing	260
Order staying mandate	261
Petition for writ of error	262
Assignment of errors	265
Order allowing writ of error, &c.	277
Bond on writ of error	278
Præcipe for transcript of record	283
Clerk's certificate	286
Writ of error	289
Return to writ of error	290
Citation and service	291

No. 2745

United States

Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

In the Superior Court of the State of Arizona, in an for the County of Maricopa.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Complaint.

Comes now the plaintiff, by Messrs. Hayes & Laney, his attorneys, and complaining of the defendant, for cause of action says:

I.

That the plaintiff is a resident of Maricopa County, Arizona, and that the defendant is now and was during all the times hereinafter referred to, a corporation and a common carrier, maintaining offices and doing business within and between the States of California and Arizona, owning property and conducting business in Maricopa County in the State of Arizona, and having an agent and representative within said Maricopa County, and engaged, among other things, in the transportation of freight for hire.

II.

That on the 1st day of July, 1913, and during all the other times hereinafter referred to, the plaintiff was the owner of one hundred and fifty-two (152) head of dairy cows; that on said 1st day of July, 1913, the plaintiff delivered said cows and all thereof to the agent of the defendant at San Luis Obispo,

California, for carriage to Phoenix, Arizona; that said cows were at the time of said delivery, robust, healthy, and in every way in first-class physical condition. That said agent on behalf of said defendant as a common carrier for hire, [3*] accepted said cows at said San Luis Obispo, California, a station on the defendant's line, and in consideration of the freight to be paid to the defendant for said services as measured by the rate applicable to the shipment and carriage of livestock in carload lots from said San Luis Obispo, California, to Phoenix, Arizona, as published and on file with the Interstate Commerce Commission, undertook to carry and transport said cows to Phoenix, Arizona, and to make delivery of said cows and all thereof to this plaintiff in good condition at said Phoenix, Arizona.

III.

That when said defendant company accepted the delivery of said cows, and undertook to transport them for the plaintiff from San Luis Obispo, California to Phoenix, Arizona it owed to the plaintiff the duty of transporting said cows safely between said points, and delivering said cows to the plaintiff at Phoenix, Arizona, in good condition; that the defendant in violation of its duty to the plaintiff to safely transport said cows to Phoenix, Arizona, and to deliver them to the plaintiff at Phoenix, Arizona in good condition handled and transported said cows in such grossly negligent and careless manner as hereinafter set forth, that five of said cows died as

*Page-number appearing at foot of page of original certified Record.

a result thereof, at Yuma, Arizona, a station on the line of said Southern Pacific Company, and the remainder thereof, to wit: One hundred forty-seven (147) head of said cows were delivered to the plaintiff at Phoenix, Arizona, in such crippled, sick and injured condition, that six more of said cows died within a few days after said delivery, and eighty-seven (87) head thereof were seriously injured and depreciated in value, as *as* the direct result of the grossly negligent handling and transportation of said cows, as hereinafter particularly set forth. [4]

IV.

That the plaintiff accompanied said shipment of cattle from San Luis Obispo, California to Yuma, Arizona, a station on the line of the defendant company; that said shipment arrived at Yuma, Arizona, at ten o'clock A. M. on the 4th day of July, 1913, said cows being at the time of their arrival in Yuma, Arizona, in perfect physical condition; that upon their arrival at Yuma, the defendant by its agent at said station requested this plaintiff to unload said cows at said station; that the weather at Yuma, Arizona at said time was extremely hot, and the stock-pens in which said cows were to be placed were very dusty and entirely unprotected from the rays of the sun, all of which facts were well known to said agent of this defendant; that this plaintiff in response to said request, advised said agent that through one A. R. Gatter, an agent and representative of the defendant company at Phoenix, Arizona, he had arranged to meet the train upon which said cows were

being transported over the lines of the defendant company, at Maricopa, Arizona, a station on the line of the defendant company, with a train upon which said cows were to be transferred and immediately transported to Phoenix, Arizona; and the plaintiff further warned the agent of the defendant company at Yuma, that to unload said cows at said station and to place the same in the company's stock-pens under the conditions above set forth, would result in serious injury and possible death of said cattle, to the damage of the plaintiff. The plaintiff further advised said agent of the then good condition of said cattle, and that by permitting them to be transported through to Maricopa, Arizona, on the train to which said cattle were attached, would protect them from the rays of the sun and the extreme heat to which they would be exposed at the station of Yuma, and would permit of their unloading at Phoenix, Arizona, during the evening of the said [5] 4th day of July, and would in every way protect them from exposure and injury; that the train on which said cattle had been transported to Yuma, arrived at Maricopa at 7:15 P. M. of said 4th day of July, and an engine and crew were waiting at said station of Maricopa in conformity with the arrangements made through said Gatter to transfer said cattle from there to Phoenix, and had the instructions and requests of the plaintiff herein been obeyed, said cattle would have arrived at Phoenix, at an hour not later than 10:00 P. M. of said 4th day of July, 1913, and would by such arrangement have been completely protected from the heat of the sun,

and would have been delivered to the plaintiff at Phoenix, Arizona, at such hour as to avoid their exposure to the heat of the sun; that notwithstanding plaintiff's request and the reasons expressed therefor, the said agent of the defendant company at Yuma, again demanded of the plaintiff that the said cows be then and there unloaded; that the plaintiff thereupon refused to unload his said cows at said place for the reasons aforesaid, and again warned said agent of the injury that would result to them from his proposed action, and that his company would be held strictly responsible for all damage and loss resulting therefrom to the plaintiff; that notwithstanding said warning from the plaintiff of the injury and loss that would result to the plaintiff, and the plaintiff's refusal to unload or assist in unloading said cows, said defendant, through its agent and employees, unloaded said cows and placed them in the stock-pens of the defendant, under the conditions above set forth; that said cows remained in said pens, exposed to the extreme heat and dust as above set forth, from 11:00 A. M. on the 4th day of July, 1914, until about 7:00 P. M. of said day. That as a direct result thereof, five of said cows [6] died at Yuma, on said 4th day of July, and all the remainder thereof as the result of said unloading and handling as above set forth, were so injured that six head thereof died shortly after this delivery to the plaintiff at Phoenix, Arizona, and eighty-seven (87) head thereof by reasons of the injuries so received, and as the direct result of said negligent conduct on the part of the defendant company as afore-

said, were overheated, rendered sick and lame, and greatly reduced in value; that said cows so injured and killed were all of the reasonable market value of Eighty-five Dollars ($85) per head; that by reason of the death of the eleven cows as aforesaid, plaintiff has been damaged in the sum of Nine Hundred and Thirty-five Dollars ($935), and by reason of the injuries to said 87 cows as aforesaid, their market value was depreciated $20 per head, resulting in direct loss and damage to the plaintiff in the sum of Seventeen Hundred and Forty Dollars ($1,740); that the plaintiff incurred expenses and outlay for the nursing of said cows in the sum of $20.

V.

That after said injuries and prior to the institution of this action, and as soon as the plaintiff was able to determine the extent of his injury and damage, the plaintiff made demand upon the defendant company for the sum of Two Thousand Six Hundred Ninety-five Dollars ($2,695) in full satisfaction of the damage and injury to the plaintiff, by reason of the negligence of the said defendant company as above set forth, which said demand was refused.

WHEREFORE, plaintiff prays judgment against the defendant;

1. For the sum of Two Thousand Six Hundred and Ninety-five Dollars ($2,695) as compensatory damages for his loss as above set forth. [7]

2. For the sum of One Thousand Dollars ($1,000) as punitive or exemplary damages.

3. For his costs herein incurred.

HAYES & LANEY,
Attorneys for Plaintiff.

[Endorsed]: No. 8603. Filed Jul. 2, 1915. James Miller, Jr., Clerk Superior Court.

[Endorsements]: Filed Jul. 23, 1915 at —— M. George W. Lewis, Clerk. By Aileen Russell, Deputy. [8]

[Summons.]

In the Superior Court of the County of Maricopa, State of Arizona.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Action brought in the Superior Court of the County of Maricopa, State of Arizona, and the Complaint filed in said County of Maricopa in the Office of the Clerk of said Superior Court.

In the Name of the State of Arizona, to Southern Pacific Company, a Corporation, Defendant, GREETING:

YOU*R* ARE HEREBY SUMMONED and required to appear in an action brought against you by the above-named plaintiff in the Superior Court of the county of Maricopa, State of Arizona, and answer the Complaint therein filed with the clerk of this said court, at Phoenix, in said county, within

twenty days after the service upon you of this Summons, if served in this said county, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

Given under my hand and the seal of the Superior *County* of the county of Maricopa, State of Arizona, this second day of July, 1915.

[Seal] JAMES MILLER, Jr.,
Clerk of said Superior Court.

Office of the Sheriff,
County of Maricopa,—ss.

I HEREBY CERTIFY that I received the within summons on the second day of July, A. D. 1915, at the hour of 5 P. M., and personally served the same on the third day of July, A. D. 1915, on [9] Southern Pacific Company, a Corporation being the defendant named in said Summons, by delivering to R. A. *Gstter,* General Agent for said Southern Pacific Company, a corporation, in the county of Maricopa, a copy of said Summons, to which was attached a true copy of the Complaint mentioned in said Summons.

Dated this third day of July, A. D. 1915.

J. D. ADAMS,
Sheriff.
By J. T. Murphy,
Deputy Sheriff.

Fees, Service .....$
Copies $1.00
Travel 1 miles,.....$ .20
Publication .....$——
Total.....$1.20

[Endorsed]: No. 8603. Filed July 6, 1915. James Miller, Jr., Clerk. By Jennie Smith, Deputy Clerk.

[Endorsements]: Filed July 23, 1915, at —— M. George W. Lewis, Clerk. Aileen Russell, Deputy. [10]

[Order Continuing Hearing on Demurrer.]

In the United States District Court for the District of Arizona.

Minute Entry Appearing Under Date of Monday, September 20, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

IT IS ORDERED by the Court that the hearing on the demurrer herein be postponed until Monday, the 4th day of October, A. D. 1915, at Phoenix, Arizona, in pursuance of stipulation of counsel. [11]

[Order of Submission of Demurrer.]

In the United States District Court for the District of Arizona.

Minute Entries Appearing Under Date of October 5th, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

The hearing on the plaintiff's demurrers to the defendant's pleas in bar came on regularly this day, the plaintiff appearing by P. H. Hayes, Esquire, and the defendant appearing by F. H. Hartman, Esquire, and J. C. Forest, Esquire, and the said demurrers are argued by counsel and submitted to the Court for decision thereon and the Court takes the same under advisement.

[Order Assigning Cause for Hearing.]

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

With the consent of counsel for both sides, IT IS ORDERED that this case be set down for trial on

October 15, 1915, at 9:30 o'clock, A. M., subject to the ruling of the Court on the demurrers of the plaintiff to the defendant's pleas in bar, this day argued and submitted to the Court and not yet decided. **[12]**

[Order Sustaining Demurrer to First and Second Pleas, etc.]

In the United States District Court for the District of Arizona.

Minute Entry Appearing Under Date of October 9th, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

The demurrers of the plaintiff to the defendant's pleas in bar having been argued by counsel and submitted to the Court on a former day of this term and the Court having maturely considered the same,

IT IS ORDERED that the said demurrers to the first and second pleas in bar of the defendant be and the same are hereby sustained, to which ruling of the Court the defendant excepts and asks that its exception be noted upon the record and the same is accordingly done. **[13]**

[Order Permitting Filing of Defendant's Amended Answer, etc.]

In the United States District Court for the District of Arizona.

Minute Entry Appearing Under Date of October 11, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PAC. CO.,

Defendant.

Upon motion of the defendant by counsel, IT IS ORDERED that the defendant be permitted to file its amended answer herein, and the said amended answer having been filed together with pleas in bar to the plaintiff's complaint, IT IS ORDERED, on application of plaintiff, that the plaintiff be permitted to file his demurrer and answer to the said pleas in bar and that the said demurrers be set down for argument on October 12, 1915, at two o'clock P. M. [14]

In the United States District Court for the District of Arizona.

No. 142 (PHX.)

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Defendant's Second Amended Pleas and Answer.

Now comes the above-named defendant, Southern Pacific Company, and files this, its second amended pleas and answer and says:

FIRST PLEA IN BAR.

That defendant is now and was during all of the times mentioned in plaintiff's complaint herein a common carrier by railroad, engaged in interstate commerce and operating a line of railroad extending through the States of California and Arizona, and other States.

That heretofore, on or about July 1, 1913, this defendant, in its capacity as such common carrier, received from plaintiff at the said town of San Luis Obispo, in the State of California, those certain 152 head of cows, being the same animals as mentioned and described in plaintiff's complaint herein, for transportation over its said line of railroad and its connecting carrier, to wit, Arizona Eastern Railroad Company, from the said town of San Luis Obispo to the city of Phoenix, in the State of Arizona.

That in the course of such transportation, and on July 2, 1913, at 2:35 P. M., the said cattle were by this defendant unloaded for feed and rest at the city of Los Angeles, State of California, at a station on defendant's said line of railroad, [15] and thereafter, and without any unusual delay were again loaded into cars of this defendant, on July 3, 1913, at about 3:40 P. M., and forwarded from the city of Los Angeles, on said date, and were transported by this defendant in its said cars, on its said line of railroad, from the said city of Los Angeles, without any unusual delay and without any negligence whatever on the part of defendant, to the town of Yuma, in the State of Arizona, a station upon defendant's said line of railroad. That said cattle arrived at the said station of Yuma, in the State of Arizona, at about the hour of 10:35 A. M. of July 4, 1913.

That at the time said cattle so arrived at the said station of Yuma, in the said State of Arizona, they had been confined in said cars for about twenty *hour* without feed or rest, and that it was absolutely necessary for defendant to unload said cattle at the said town of Yuma for feed and rest, in order to comply with the provisions of that certain Act of Congress entitled "An Act to Prevent Cruelty to Animals While in Transit by Railroad or Other Means of Transportation from One State, Territory or the District of Columbia into or Through Another State, Territory or the District of Columbia," etc., approved June 29, 1906, 34 Stat. L., p. 607, 1909 Supp. Fed. Anntd. Stats., p. 43.

That defendant did so unload said cattle at the said

station of Yuma for feed and rest for the purpose of complying with the provisions of said Act of Congress; and that without violating said Act of Congress it was impossible for defendant to have transported said cattle any farther than said station of Yuma, before unloading same for feed and rest, in this, to wit, that if said cattle had not been so unloaded, but had been transported to destination, without unloading for feed and rest at Yuma, Arizona, it would have resulted in the cattle having been [16] confined in the said cars in excess of twenty-eight consecutive hours.

That plaintiff did not, nor did anyone for him, upon the arrival of said cattle at the said town of Yuma, Arizona, or at any other time or place, file with or tender to this defendant or any of its agents any written request, separate and apart from any printed bill of lading or other railroad form, extending the time which said animals could be confined from twenty-eight to thirty-six hours, as provided by said statute.

That defendant had at said time properly equipped stock-pens and stock corrals at a certain station on its said line of railroad known as Gila, Arizona, a distance of 123 miles easterly from the said town of Yuma and in the direction in which said cattle were being transported, but that neither this defendant nor its connecting carrier, the said Arizona Eastern Railroad Company had at said time any stock-pens or corrals at the station of Maricopa, Arizona, the point at which said cattle were to be delivered by this defendant to its said connecting carrier, said

Arizona Eastern Railroad Company, for transportation by said Arizona Eastern Railroad Company to destination, the said city of Phoenix, into which said cattle could have been unloaded for feed and rest.

That upon the arrival of said cattle at the said town of Yuma, Arizona, this defendant was willing and anxious and offered to transport said cattle for plaintiff on to the said station of Gila, upon its said line, there to be unloaded for feed and rest, but that plaintiff absolutely refused to permit *plaintiff* to do so.

That thereupon and immediately upon the arrival of said cattle at the said station of Yuma, Arizona, on July 4, 1913, at about 10:35 A. M., this defendant notified its said connecting [17] carrier, to wit, said Arizona Eastern Railroad Company, by telegraph, that said cattle were then at said town of Yuma, en route to Phoenix, Arizona, and requested information from the said Arizona Eastern Railroad Company if it could handle said cattle if this defendant should transport said cattle on to said station of Maricopa from the said town of Yuma without feed and rest, and the said Arizona Eastern Railroad Company notified, advised and informed this defendant that it could not so handle said cattle from the said station of Maricopa, Arizona, to the place of destination, to wit, Phoenix, Arizona, and that it, the said Arizona Eastern Railroad Company did not and would not have any facilities at the said station of Maricopa upon the arrival of said freight-train so containing said cattle, if the said cattle should be brought

to the said station of Maricopa without unloading for feed and rest, to enable it, the said Arizona Eastern Railroad Company to transport said cattle from the said station of Maricopa to destination at Phoenix, Arizona, within thirty-six hours from the time said cattle were so loaded at the said city of Los Angeles, State of California, as hereinbefore set forth; and that by reason of the foregoing facts it was necessary for this defendant, in order to comply with the said Act of Congress known as the Twenty-eight Hour Law, to unload said cattle at the said town of Yuma for feed and rest, even though plaintiff had filed with this defendant a written request, as proved by said act, extending the time which said animals could be confined from twenty-eight to thirty-six hours, which this defendant specifically denies.

That at the time of the arrival of said cattle at the said town of Yuma, on account of the extreme heat at that place and in the country through which they had been transported, they were in no condition to be kept in the cars any longer and [18] were in no condition to withstand further shipment without feed and rest.

That defendant, thereafter, and on the same day, to wit, July 4, 1913, reloaded said cattle into its said cars at the said station of Yuma and forwarded the same to destination over its said line of railroad and the line of its connecting carrier, to wit, the said Arizona Eastern Railroad Company, to the city of Phoenix, State of Arizona, without any unusual delay and without any negligence whatsoever on its part.

That by reason whereof plaintiff is not entitled to recover any damages from this defendant for the matters and things set forth in his said complaint.

WHEREFORE, defendant prays for judgment that plaintiff take nothing by his action herein and that defendant have judgment for its costs.

FRANCIS M. HARTMAN,
Tucson, Arizona,
J. C. FOREST,
Phoenix, Arizona,
Attorneys for Defendant. [19]

SECOND PLEA IN BAR.

And defendant, for another and further plea in bar, to that portion of plaintiff's complaint wherein he is seeking to recover damages for six head of said cattle, which plaintiff alleges died shortly after delivery at destination in the sum of eighty-five dollars per head, to wit, five hundred ten dollars; and for eighty-seven head which plaintiff alleges were damaged in the sum of twenty dollars each, to wit, seventeen hundred forty dollars; and for twenty dollars which plaintiff alleges he paid out for nursing said cattle, says:

That heretofore, on or about July 1, 1913, this defendant, as a common carrier, received from plaintiff at the town of San Luis Obispo, in the State of California, those certain 152 head of cows, as mentioned and described in plaintiff's complaint, for transportation, in five cars, to the city of Phoenix, in the State of Arizona, over the line of railroad operated by defendant and its connecting carriers, under three certain contracts in writing, then and

there made and entered into by and between plaintiff and his duly authorized agents, to wit, one Frank E. Whitten and one James Ford, and this defendant, which said contracts were identical in form and the contents of each were the same with the exception that one of said contracts was executed by the said Frank R. Stewart, in person and covered sixty head of said cattle, contained in two of said cars; one of said contracts was executed by the said Frank E. Whitten, the duly authorized agent of and for and on behalf of said Frank R. Stewart, the owner of said cattle, and covered sixty-two head of said cattle, contained in two of said cars; and the other of said contracts was executed by the said James Ford, the duly authorized agent of and for and on behalf of the said Frank R. Stewart, the owner of said cattle, and covered [20] thirty head of said cattle, contained in one of said cars; true and correct copies of which said contracts are attached hereto and made a part hereof, marked exhibits "A," "B" and "C," respectively.

That the original copies of each of said contracts were by this defendant, at the time and place of execution thereof, to wit, on July 1, 1913, at San Luis Obispo, California, delivered to plaintiff, and defendant is informed and believes and upon such information and belief alleges that plaintiff now has the same in his possession or control.

That the said Frank R. Stewart, although being the owner or claiming to be the owner of all of said cattle, shipped sixty-two head of said cattle in the name of said Frank E. Whitten and thirty head of

said cattle in the name of said James Ford.

That in transporting said shipment of cattle this defendant fully performed each and every act on its part required to be performed by the terms and provisions of said contracts and by the published freight tariffs governing such shipments, and if any loss or injury occurred to said livestock, as alleged in plaintiff's complaint, all of which this defendant expressly denies, this defendant is exempt from liability therefor under the terms and stipulations set forth in said agreements.

That under and by virtue of the terms of said contracts and each of them plaintiff herein agreed and bound himself that in case any loss or damage should be sustained for which this defendant might be liable that then this plaintiff should make demand or claim therefor in writing to the freight claim agent of this defendant within ten days after the unloading of said cattle at destination, to wit, at the city of Phoenix, State of Arizona, and that in the event of the failure of plaintiff [21] to do so all claims for loss or damage in the premises were thereby expressly waived, released and made void.

That said cattle were unloaded by plaintiff and received and taken and driven away by him on the 5th day of July, 1913, at destination, to wit, at the city of Phoenix, Arizona, and that plaintiff did not, nor did anyone for him or on his behalf, within ten days after so unloading said cattle at destination, make any demand or claim in writing to the freight claim agent of this defendant or to this defendant or to any agent of this defendant company for any

loss or damage to said shipment of cattle.

That it was entirely possible for plaintiff to have given such notice, and that this defendant at all the times mentioned in plaintiff's complaint had an agent at the said city of Phoenix, State of Arizona, at the place where said cattle were unloaded, as set forth in plaintiff's complaint, and that said defendant had at all of said times many agents in said State of Arizona, and in the State of California to whom such notice could have been given.

That by reason of the failure of plaintiff or anyone for him or on his behalf to make any claim in writing within ten days after the unloading of said cattle, to the freight claim agent of this defendant or to any agent of this defendant, as aforesaid, for any loss or damage to any of said cattle, that plaintiff thereby expressly waived and released any and all claims whatsoever against this defendant on account of any loss or damage to said cattle, if said cattle were damaged as alleged.

That by reason of the failure of plaintiff to give such notice in manner and form as required by said agreement that he is not entitled to recover in this action for the six [22] head of cattle alleged to have died shortly after delivery, nor for damages in the sum of twenty-dollars per head for eighty-seven head alleged to have been injured, nor for the said sum of twenty dollars alleged to have been paid out for nursing said cattle.

WHEREFORE, defendant prays that plaintiff take nothing by his action herein for said matters and things above set forth.

FRANCIS M. HARTMAN,
Tucson, Arizona,
J. C. FOREST,
Phoenix, Arizona,
Attorneys for Defendant. [23]

C. J. JONES
GENERAL FREIGHT AGENT
NORTHERN DIST.—PACIFIC SYSTEM,
SAN FRANCISCO, CAL.

G. W. LUCE,
FREIGHT TRAFFIC MANAGER,
SAN FRANCISCO, CAL.

J. G. STUBBS,
GENERAL FREIGHT AGENT,
SOUTHERN DIST.—PACIFIC SYSTEM,
LOS ANGELES, CAL.

LIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING

SPECIAL AGREEMENT

No. 157

San Luis Obispo Station July 1 - 1913 191

Agent, Southern Pacific Company:

Please forward the following described Live Stock at declared valuation per head hereinafter set forth, and under conditions shown on back hereof, and also subject to the conditions hereinafter more particularly set forth, all of which provisions and conditions have been read by the undersigned and are clearly understood and accepted, and are hereby expressly made a part hereof and agreed to by the undersigned, in consideration of the special rate which is thus attained, and of divers other good and sufficient considerations, receipt whereof is hereby acknowledged.

Frank R Stewart Consignee Phoenix, Ariz Destination

Way-bill No.	CAR Initial	CAR No.
SP 3	MLT	14398
SP 4	GH	14673

If consignee fail for any cause to take delivery of this shipment for a period of five days after arrival thereof at destination, or at any other intermediate point in case of accident, the Southern Pacific Company or its Agent is hereby authorized to sell said shipment at public auction to the highest bidder, five days after sending notice to shipper at ..... by telegraph, of such intent to sell because of such failure to take delivery, unless within five days after sending said notice consignee or owner pay charges and take delivery thereof.

Number of Head	DESCRIPTION	Declared Value per Head, to be entered by Shipper	
	Horses, Ponies		
	Mules, Jacks		
	Colts (under 1 yr.)		
	Oxen, Bulls, Steers		
60	Cows	30	00
	Calves		
	Hogs		
	Sheep, Goats		
	Cattle, Range		

If the declared value per head is not declared by the shipper, it is understood and assumed that the value is as printed in specific figures on the reverse side of this contract for Ordinary Live Stock.

Page Witness Frank R Stewart Shipper

AGREEMENT made at the station and on the date above named, by and between Southern Pacific Company, hereinafter called first party, and the person whose signature appears above as shipper, hereinafter called second party.

WHEREAS, first party transports live stock under certain rates, rules, and conditions as expressed in General Freight Department Circular G. F. D. No. 188-E, supplements thereto and reissues

SP 4	GH	14673		Colts (under 1 yr.)		
				Oxen, Bulls, Steers		
			60	Cows	30.00	
				Calves		
				Hogs		
				Sheep, Goats		
				Cattle, Range		

ized to sell said shipment at public auction to the highest bidder, five days after sending notice to shipper at .....by telegraph, of such intent to sell because of such failure to take delivery, unless within five days after sending said notice consignee or owner pay charges and take delivery thereof.

and assumed that the value is as printed in specific figures on the reverse side of this contract for Ordinary Live Stock.

Page Witness Frank R Stewart Shipper

AGREEMENT made at the station and on the date above named, by and between **Southern Pacific Company**, hereinafter called first party, and the person whose signature appears above as shipper, hereinafter called second party.

WHEREAS, first party transports live stock under certain rates, rules, and conditions as expressed in General Freight Department Circular G. F. D. No. 188-E, supplements thereto and reissues thereof, and known as "Rules and Regulations Governing the Transportation of Live Stock," and the various classifications and tariffs applying between points under which the service named in this special agreement is to be performed, and in accordance with which the agreement is made and entered into, first party hereby undertaking to transport for second party certain live stock hereinbefore described, at the *rate of $..... per..... 's account, and more particularly described as follows, in so far as concerns car or cars in which contained, and Way-bill numbers.

*If but one animal in shipment, show rate "PER HEAD," if more than one, "PER LOT," except that when carload shipments are made the rate "PER CAR" may be shown.

NOW, THEREFORE, second party for and in consideration of the premises and the rates hereinbefore named, and the service to be performed hereunder, and other good and sufficient considerations (in case of carload shipment carriage of man or men in charge at reduced rate, or free, as rules may provide), hereby agrees to **Load said Live Stock at Point of Shipment, Unload and Reload at Resting Places, and Unload at Destination, and to Feed and Water at his Expense, and to Accompany and Attend Said Live Stock en route and to Destination.** Second party has examined the car or cars into which it is proposed to load such live stock, which is or are numbered and initialed as above, and accepts said car or cars as proper and suitable vehicles for transportation of the property for which this contract is issued, and hereby assumes all risk of loss or damage of or to said live stock or to the persons who may be in charge thereof, or which the animals may occasion themselves or each other, and all loss or damage resulting from heat, suffocation or climatic conditions, overcrowding in cars or steamers, burning of hay, straw or other material placed by shipper or any other person in car or steamer, as the case may be, for feed or other purposes, or which may be sustained by reason of delay incident to ordinary transportation; it being further understood and agreed between the parties hereto that first party does not undertake to forward said shipment of live stock by any particular train or boat, or in time for any particular market. When the transportation of said live stock between the points mentioned in this special agreement is by water, in the steamers of first party, or in case any part of the carriage of said live stock shall involve water transportation, second party, in addition to the foregoing, hereby assumes all risk of loss or damage attending the transfer of said live stock, whether in car or to or from car or steamer, and wharf corrals and steamer, or transfer boat, or from slipping or falling, or from or through breaking of corrals, or breaking of hatch coverings while on said steamer or transport boat, or from accidents or disasters incident to steam navigation, or dangers of the sea of whatsoever nature or kind. And second party hereby specially agrees that in no event is first party or its lessors to be liable for any loss of or damage to said live stock not proven to have been caused by the gross negligence of first party in the performance of or failure to perform some duty which, under the terms of this contract, is due from first party to second party as to said live stock.

It is further understood and agreed by second party that the live stock covered by this special agreement is to be transported subject to the conditions of State, Territorial or Federal laws governing the transportation, unloading and resting of live stock en route; and in case first party should, through its employees, furnish aid to assist in loading, caring for en route, unloading or transferring said live stock, said employees of first party so assisting or performing services shall be subject to the orders and deemed the employees of second party while so engaged, and not in any sense the agents of first party; and when live stock is in corrals at shipping point, resting place or destination, it shall be at owner's risk of loss or damage through breaking out of corrals or in loading and unloading.

Second party hereby further agrees that in case any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by second party on the Freight Claim Agent of first party in writing, within ten days after unloading of the live stock; and that in event of failure so to do all claims for loss or damage in the premises are hereby expressly waived, released and made void, and it is also expressly agreed by second party that the amount to be by him claimed for each animal as described herein, so lost or damaged, shall be adjusted on basis of value at time and place of shipment, not exceeding the declared value as hereinbefore set forth, and on which declared value the rate or rates of transportation hereinbefore named by first party are based, and in no event is there to be any recovery from first party or its lessors for any loss of or damage to said live stock, from whatsoever cause arising in excess of the declared value hereinbefore set forth.

It is hereby further understood and agreed by second party that in case the live stock herein described be destined to any point off the railroad of first party, or to a point beyond the destination to which rate is named herein, all common carriers engaged in the transporation of said live stock to destination of said live stock shall have and enjoy the special privileges and exemptions herein accorded to first party, when the rate or rates charged by such common carrier or carriers are conditioned on agreement limiting carriers' liabilities; provided, however, that the responsibility of first party, whether as common carrier or otherwise, shall cease and utterly determine upon arrival of said live stock at the station where the said live stock is to leave the road of first party in the course of transportation to destination. Provided, further, that Southern Pacific Company is not to be liable for any loss, damage or delay arising from any act or omission occurring before delivery of shipment to Southern Pacific Company by initial carrier.

First party hereby admits that it has received at the station and on the date first above written, from second party, certain live stock as hereinbefore described, to be transported as aforesaid at the rate or rates, and subject to the rules and conditions hereinbefore and hereinafter referred to; and agrees that said live stock will be delivered as aforesaid unto second party, or order, or assigns, subject to the conditions hereinbefore and hereinafter expressed, on the surrender of this instrument and payment of transportation charges, as agreed.

It is further expressly understood and agreed by second party that the live stock hereinbefore referred to is to be carried by first party subject to all terms and conditions set forth or referred to in the following described documents providing rules and regulations governing the transportation of live stock, and issued by the General Freight Department of first party, namely: (1) Circular G. F. D. 188-E, supplements thereto and reissues thereof, and known as "Rules and Regulations Governing the Transportation of Live Stock;" (2) All circulars at any time thereafter issued by said General Freight Department prior to the issuance of the present contract, in any way affecting the terms and conditions of the circulars above mentioned or any of them, or in any way affecting said rules and regulations for the transportation of live stock.

Frank R Stewart (EXHIBIT "A") T. F Delaney

Shipper. Agent Southern Pacific Company.

ORIGINAL

SOUTHERN PACIFIC COMPANY
PACIFIC SYSTEM

LIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING

SPECIAL AGREEMENT

...sued by .....

.....Station, Date.....191...

.....car.... of.....good for transportation of

.....

.....

.....

Billing agent stamp here.

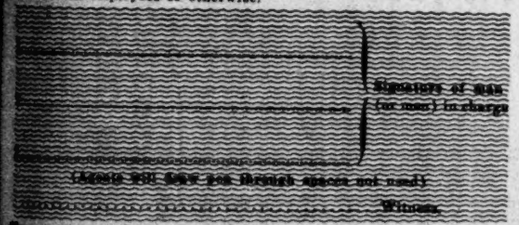
.....to .....

...when accompanying the stock herein described and not otherwise.

...Contract must be presented to Agent at.....for renewal

RELEASE FOR MAN OR MEN IN CHARGE

In consideration of the carriage of the undersigned upon a freight train of ...rrier or carriers named in the within contract, without charge other than ...en stipulated therein, for the carriage of the live stock mentioned therein, ...undersigned in charge do hereby, voluntarily, assume all risk of accident or ...ge to his (or their) person or property, and do hereby release and discharge ...said carrier or carriers from every and all claim, liability and demand of ...y kind, nature and description, for or on account of any personal injury or ...ss of any kind sustained by the undersigned so in charge of said stock, ...ether the same be caused by the negligence of the said carrier or carriers or ...of its or their employees or otherwise.



The man or men who may be entitled to return transportation free or at a ...ced rate under carriers' rules in effect, published and posted as required by ...w at time this contract was executed, will upon surrender of this contract to ...carrier' agent, receive ticket or tickets for the return journey.

TIME OF LOADING

.....191..... Hour.....m.

...ed at .....

...ar arrived .....Hour.....m.

...ar left .....Hour.....m.

.....

Name of Consignee

...E OF ARRIVAL AT.....

(Destination)

.....191..... Hour.....m.

TIME OF UNLOADING

.....191..... Hour.....m.

..... Agent

VALUATION

Ordinary Live Stock will be received for transportation under the form of contract appearing upon the other side of this paper, subject to the following additional conditions: Shipments of Live Stock moving between points in Oregon will be received for transportation under the conditions of the "Low Value Live Stock Contract" and "Special Value Live Stock Contract."—(Uniform Live Stock Contract prescribed by the Railroad Commission of Oregon.) Rates as shown in the tariffs of this Company apply only on Ordinary Live Stock, that is, the actual and declared value of which does not exceed:

Each Horse or Pony (Gelding, Mare or Stallion), Mule or Jack	$100.00
Each Colt (under 1 year)	50.00
Each Ox, Bull or Steer	50.00
Each Cow	30.00
Each Calf	10.00
Each Hog	10.00
Each Sheep or Goat	3.00
Range Cattle, each animal	30.00

Values in excess of the foregoing will be considered extraordinary, and such Extraordinary Live Stock will be received and forwarded by this Company only under the form of Contract above mentioned and subject to increased charges as compared with Ordinary Live Stock, as follows:

When actual and declared value exceeds that of Ordinary Live Stock, as shown above, by

100 per cent or less, increase the charge on each	10 per cent
200 per cent or less, increase the charge on each	20 per cent
300 per cent or less, increase the charge on each	30 per cent
400 per cent or less, increase the charge on each	40 per cent
500 per cent or less, increase the charge on each	50 per cent
600 per cent or less, increase the charge on each	60 per cent
700 per cent or less, increase the charge on each	70 per cent
800 per cent or less, increase the charge on each	80 per cent
900 per cent or less, increase the charge on each	90 per cent
1000 per cent or less, increase the charge on each	100 per cent

Charge on animals of greater value in like proportion, but in no case will greater charge be made for other animals than for a horse of same valuation.

INSTRUCTIONS

Shippers or their agents must acquaint themselves with the rules and regulations governing the transportation of Live Stock as per G. F. D. Circular 188-E, supplements thereto and reissues thereof, and known as "Rules and regulations Governing the Transportation of Live Stock," and the terms of said form of contract above mentioned.

ATTENDANTS

Attendants accompanying Live Stock to destination and returning under conditions and rules of this Contract and Bill of Lading, also Circular G. F. D. No. 188-E, supplements thereto and reissues thereof, will be cared for as follows:

With 1 carload of Live Stock 1 man may accompany free, but not return free
With 2 to 5 carloads.....1 man may accompany and return free
With 6 to 10 carloads.....2 men may accompany and return free
With 11 or more carloads.....3 men may accompany and return free

When more than one carload of stock is shipped account of one owner from different stations to one destination, on same train, man or men may accompany as per above, and will be entitled to return free as follows:

One man to the station where the second car was placed in train.
One additional man to the station where the sixth car was placed in train.
One additional man to the station where the eleventh car was placed in train.

Transportation will be furnished to persons in charge of sheep, Hogs, Goats and Calves in DOUBLE-DECK CARS ON BASIS OF TWO SINGLE-DECK CARS as equivalent to one double-deck.

RECEIPT
FOR THE
RETURN TRANSPORTATION
FURNISHED ORIGINAL OR SUBSTITUTED LIVE STOCK ATTENDANTS

Received Ticket, Form.....No.....Date.....

1..... To .....

Signature.....

Slim O	Light Eyes O	Light Hair C	Mustache O
Medium O	Dark Eyes O	Dark Hair O	Chin Beard O
Stout O	Light Hair C	Gray Hair O	Side Beard O
Short O	Dark Hair O	Tall O	Full Beard O
Medium O	Gray Hair O	Young O	No Beard O
Tall O	Mustache O	MiddleAge O	
Young O	Chin Beard O	Elderly O	
MiddleAge O	Side Beard O		
Elderly O	Full Beard O		
	No Beard O		

Received Ticket, Form.....No.....Date.....

2..... To .....

Signature.....

Slim O	Light Eyes O	Light Hair O	Mustache O
Medium O	Dark Eyes O	Dark Hair O	Chin Beard O
Stout O	Light Hair O	Gray Hair O	Side Beard O
Short O	Dark Hair O	Tall O	Full Beard O
Medium O	Gray Hair O	Young O	No Beard O
Tall O	Mustache O	MiddleAge O	
Young O	Chin Beard O	Elderly O	
MiddleAge O	Side Beard O		
Elderly O	Full Beard O		
	No Beard O		

Received Ticket, Form.....No.....Date.....

3..... To .....

Signature.....

Slim O	Light Eyes O	Light Hair O	Mustache O
Medium O	Dark Eyes O	Dark Hair O	Chin Beard O
Stout O	Light Hair O	Gray Hair C	Side Beard O
Short O	Dark Hair O	Tall O	Full Beard O
Medium O	Gray Hair C	Young O	No Beard O
Tall O	Mustache O	MiddleAge O	
Young O	Chin Beard O	Elderly O	
MiddleAge O	Side Beard O		
Elderly O	Full Beard O		
	No Beard O		

SUBSTITUTED ATTENDANT

Received Ticket, Form.....No.....Date.....

..... To .....

Signature.....

Slim O	Light Eyes O	Light Hair O	Mustache O
Medium O	Dark Eyes O	Dark Hair O	Chin Beard O
Stout O	Light Hair O	Gray Hair O	Side Beard O
Short O	Dark Hair O	Tall O	Full Beard O
Medium O	Gray Hair O	Young O	No Beard O
Tall O	Mustache O	MiddleAge O	
Young O	Chin Beard O	Elderly O	
MiddleAge O	Side Beard O		
Elderly O	Full Beard O		
	No Beard O		

SUBSTITUTED ATTENDANT

In case it becomes necessary for one of the persons in charge to leave train en route, substituting another in his place, such substitution must be made in presence of the Agent at station at which it occurs, who will cancel original signature and description and see that those of the substitute are properly affixed.

.....Substitutes .....

At .....

.....Agent

Slim O	Light Eyes O	Light Hair O	Mustache O
Medium O	Dark Eyes O	Dark Hair O	Chin Beard O
Stout O	Light Hair O	Gray Hair O	Side Beard O
Short O	Dark Hair O	Tall O	Full Beard O
Medium O	Gray Hair O	Young O	No Beard O
Tall O	Mustache O	MiddleAge O	
Young O	Chin Beard O	Elderly O	
MiddleAge O	Side Beard O		
Elderly O	Full Beard O		
	No Beard O		

SOUTHERN PACIFIC COMPANY—PACIFIC SYSTEM

C. J. JONES
GENERAL FREIGHT AGENT
NORTHERN DIST.—PACIFIC SYSTEM,
SAN FRANCISCO, CAL.

G. W. LUCE,
FREIGHT TRAFFIC MANAGER,
SAN FRANCISCO, CAL.

J. C. STUBBS,
GENERAL FREIGHT AGENT,
SOUTHERN DIST.—PACIFIC SYSTEM,
LOS ANGELES, CAL.

LIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING

SPECIAL AGREEMENT

No. 156

San Luis Obispo Station July 1 - 13 191....

Agent, Southern Pacific Company:

Please forward the following described Live Stock at declared valuation per head hereinafter set forth, and under conditions shown on back hereof, and also subject to the conditions hereinafter more particularly set forth, all of which provisions and conditions have been read by the undersigned and are clearly understood and accepted, and are hereby expressly made a part hereof and agreed to by the undersigned, in consideration of the special rate which is thus attained, and of divers other good and sufficient considerations, receipt whereof is hereby acknowledged.

Frank E Whitten Consignee Phoenix, Ariz Destination

Way-bill No.	CAR Initial	CAR No.
SP 1	MLT	14117
SP 2	SP	77565

ORIGINAL

SOUTHERN PACIFIC COMPANY
PACIFIC SYSTEM

LIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING

SPECIAL AGREEMENT

INSTRUCTIONS

Shippers or their agents must acquaint themselves with the rules and regulations governing the transportation of Live Stock as per G. F. D. Circular 188-E, supplements thereto and reissues thereof, and known as "Rules and Regulations Governing the Transportation of Live Stock," and the terms of said form of contract above mentioned.

ATTENDANTS

It is expressly understood and agreed that if Southern Pacific Company shall accept the shipment of live stock covered by this contract, unaccompanied by person to take care of such shipment, Southern Pacific Company is hereby released from all liability as to damage to or loss of said live stock, when resulting in whole, or in part, from lack of care or attention of an attendant while in transit.

Attendants accompanying Live Stock to destination and returning under conditions and rules of this Contract and Bill of Lading, also Circular G. F. D. No. 188-E, supplements thereto and reissues thereof, will be cared for as follows:

With 1 carload of Live Stock 1 man may accompany free, but not return free.

With 2 to 5 carloads.....1 man may accompany and return free
With 6 to 10 carloads.....2 men may accompany and return free
With 11 or more carloads.....3 men may accompany and return free

When more than one carload of stock is shipped account of one owner from different stations to one destination, on same train, man or men may accompany as per above, and will be entitled to return free as follows:

One man to the station where the second car was placed in train.

One additional man to the station where the sixth car was placed in train.

One additional man to the station where the eleventh car was placed in train.

Transportation will be furnished to persons in charge of Sheep, Hogs, Goats and Calves in **DOUBLE-DECK CARS ON BASIS OF TWO SINGLE-DECK CARS** as equivalent to one double-deck.

RETURN TRANSPORTATION

The man or men who may be entitled to return transportation free or at a reduced rate under carriers' rules in effect, published and posted as required by law, at time this contract was executed, will upon surrender of this contract to the carriers' agent, receive ticket or tickets for the return journey.

Return transportation of attendants in charge of Live Stock will not be honored unless the contract for return passage is presented within seven (7) days after arrival of Live Stock at destination; but on shipments of **Horses**, return transportation for attendants in charge of same will be honored if contract is presented within fifteen (15) days after arrival of Horses at destination; except that upon shipments originating at or destined to points beyond this Company's eastern terminals, namely, Portland, Ore., Ogden, Utah, and Rio Grande, N. M., return passage will be limited as follows:

When destined beyond this Company's Eastern Terminals, namely Portland, Ore., Ogden, Utah, and Rio Grande, N. M., return transportation will be furnished within 90 days after Live Stock passes said terminals. When originating at points beyond this Company's Eastern Terminals and destined to points west of said terminals, return transportation will be furnished within 30 days after arrival of Live Stock at destination.

When destined to points on connecting lines south of Portland, Ore., west of Ogden, Utah, and Rio Grande, N. M., return transportation will be furnished Caretakers entitled to such transportation, if contract is presented within fifteen (15) days after Live Stock passes junction point with connecting line.

VALUATION

Ordinary Live Stock will be received for transportation under the form of contract appearing upon the other side of this paper, subject to the following additional conditions: Shipments of Live Stock moving between points in Oregon will be received for transportation under the conditions of the "Low Value Live Stock Contract" and "Special Value Live Stock Contract."—(Uniform Live Stock Contract prescribed by the Railroad Commission of Oregon.) Rates as shown in the tariffs of this Company apply only on Ordinary Live Stock, that is, the actual and declared value of which does not exceed:

Each Horse (except Range Horses) or Pony (Gelding, Mare or Stallion), Mule or Jack	$100.00
Each Colt (under 1 year)	50.00
Each Ox, Bull or Steer	50.00
Each Cow	30.00
Each Calf	10.00
Each Hog	10.00
Each Sheep or Goat	3.00
Range Cattle, each animal	30.00
Range Horses, each animal	50.00

Values in excess of the foregoing will be considered extraordinary, and such Extraordinary Live Stock will be received and forwarded by this Company only under the form of Contract above mentioned and subject to increased charges as compared with Ordinary Live Stock, as follows:

When the actual and declared value exceeds that of Ordinary Live Stock, as shown above, the charges will be increased 10 per cent for each 100 per cent or fraction thereof increase in valuation.

Charge on animals of greater value in like proportion, but in no case will greater charge be made for other animals than for a horse of same valuation.

TIME OF LOADING

.....*191*..... *Hour*.....*m.*

Rested at .....

Date arrived ....., *Hour*.....*m.*

Date dep't'r ....., *Hour*.....*m.*

.....
Name of Consignee

TIME OF ARRIVAL AT.....
(Destination)

.....*191*..... *Hour*.....*m.*

TIME OF UNLOADING

.....*191*..... *Hour*.....*m.*

..... *Agent*

Executed by .....

at.....*Station, Date*.....*191*....

for.....*car*.... *of*.....*good for transportation of*

.....

.....

.....

Billing agent stamp here.

From ..... *to* .....
when accompanying the stock herein described and not otherwise.

This Contract must be presented to Agent at.....*for renewal*

RELEASE FOR MAN OR MEN IN CHARGE

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract, without charge other than the sum stipulated therein, for the carriage of the live stock mentioned therein, the undersigned in charge do hereby, voluntarily, assume all risk of accident or damage to his (or their) person or property, and do hereby release and discharge the said carrier or carriers from every and all claim, liability and demand of every kind, nature and description, for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise.

SIGNATURE OF MAN OR MEN IN CHARGE		NO. MEN IN CHARGE	NO. CARS SHIPPED
1	One Man Only	1	① ② ③ ④ ⑤
2	Two Men Only	2	⑥ ⑦ ⑧ ⑨ ⑩
Agents will punch No. and description of men in charge, No. of cars shipped, witness signatures and cancel unused spaces above.			
3 Witness	Three Men Only	3	⑪ Or More

RECEIPT FOR THE RETURN TRANSPORTATION
FURNISHED ORIGINAL OR SUBSTITUTED LIVE STOCK ATTENDANTS

Received Ticket, Form.....No.....Date.....
1 From .....To .....
Signature.....

Received Ticket, Form.....No.....Date.....
2 From .....To .....
Signature.....

Received Ticket, Form.....No.....Date.....
3 From .....To .....
Signature.....

Slim O	Young O	Slim O	Young O
Medium O	Middle Age O	Medium O	Middle Age O
Stout O	Elderly O	Stout O	Elderly O
Short O	Light Hair O	Short O	Light Hair O
Medium O	Dark Hair O	Medium O	Dark Hair O
Tall O	Gray Hair O	Tall O	Gray Hair O

Slim O	Young O	Slim O	Young O
Medium O	Middle Age O	Medium O	Middle Age O
Stout O	Elderly O	Stout O	Elderly O
Short O	Light Hair O	Short O	Light Hair O
Medium O	Dark Hair O	Medium O	Dark Hair O
Tall O	Gray Hair O	Tall O	Gray Hair O

Slim O	Young O	Slim O	Young O
Medium O	Middle Age O	Medium O	Middle Age O
Stout O	Elderly O	Stout O	Elderly O
Short O	Light Hair O	Short O	Light Hair O
Medium O	Dark Hair O	Medium O	Dark Hair O
Tall O	Gray Hair O	Tall O	Gray Hair O

SUBSTITUTED ATTENDANT

In case it becomes necessary for one of the persons in charge to leave train en route, substituting another in his place, such substitution must be made in presence of the Agent at station at which it occurs, who will cancel original signature and description and see that those of the substitute are properly affixed.

.....Substitutes .....
At .....
.....Agent

Slim O	Young O	Slim O	Young O
Medium O	Middle Age O	Medium O	Middle Age O
Stout O	Elderly O	Stout O	Elderly O
Short O	Light Hair O	Short O	Light Hair O
Medium O	Dark Hair O	Medium O	Dark Hair O
Tall O	Gray Hair O	Tall O	Gray Hair O

Received Ticket, Form.....No.....Date.....
From .....To .....
Signature.....

6-14-2011

SOUTHERN PACIFIC COMPANY—PACIFIC SYSTEM

C. J. JONES
GENERAL FREIGHT AGENT
NORTHERN DIST.—PACIFIC SYSTEM,
SAN FRANCISCO, CAL.

G. W. LUCE,
FREIGHT TRAFFIC MANAGER,
SAN FRANCISCO, CAL.

J. G. STUBBS,
GENERAL FREIGHT AGENT,
SOUTHERN DIST.—PACIFIC SYSTEM,
LOS ANGELES, CAL.

LIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING

SPECIAL AGREEMENT

No. 158

San Luis Obispo Station July 1 - 1913 191....

Agent, Southern Pacific Company:

Please forward the following described Live Stock at declared valuation per head hereinafter set forth, and under conditions shown on back hereof, and also subject to the conditions hereinafter more particularly set forth, all of which provisions and conditions have been read by the undersigned and are clearly understood and accepted, and are hereby expressly made a part hereof and agreed to by the undersigned, in consideration of the special rate which is thus attained, and of divers other good and sufficient considerations, receipt whereof is hereby acknowledged.

James Ford Consignee Phoenix, Ariz Destination

Way-bill No.	CAR Initial	CAR No.
SP 5	SP	75829

If consignee fail for any cause to take delivery of this shipment for a period of five days after arrival thereof at destination, or at any other intermediate point in case of accident, the Southern Pacific Company or its Agent is hereby authorized to sell said shipment at public auction to the highest bidder, five days after sending notice to shipper at .....by telegraph, of such intent to sell because of such failure to take delivery, unless within five days after sending said notice consignee or owner pay charges and take delivery thereof.

Number of Head	DESCRIPTION	Declared Value per Head, to be entered by Shipper	
	Horses, Ponies		
	Mules, Jacks		
	Colts (under 1 yr.)		
	Oxen, Bulls, Steers		
30	Cows	30	00
	Calves		
	Hogs		
	Sheep, Goats		
	Cattle, Range		

If the declared value per head is not declared by the shipper, it is understood and assumed that the value is as printed in specific figures on the reverse side of this contract for Ordinary Live Stock.

Page Witness Jas Ford Shipper

AGREEMENT made at the station and on the date above named, by and between **Southern Pacific Company**, hereinafter called first party, and the person whose signature appears above as shipper, hereinafter called second party.

WHEREAS, first party transports live stock under certain rates, rules, and conditions as expressed in General Freight Department Circular G. F. D. No. 188-E, supplements thereto and reissues thereof, and known as "Rules and Regulations Governing the Transportation of Live Stock," and the various classifications and tariffs applying between points under which the service named in this special agreement is to be performed, and in accordance with which the agreement is made and entered into, first party hereby undertaking to transport for second party certain live stock hereinbefore described, at the *rate of $..... per.....'s count, and more particularly described as follows, in so far as concerns car or cars in which contained, and Way-bill numbers.

*If but one animal in shipment, show rate "PER HEAD," if more than one, "PER LOT," except that when carload shipments are made the rate "PER CAR" may be shown.

NOW, THEREFORE, second party for and in consideration of the premises and the rates hereinbefore named, and the service to be performed hereunder, and other good and sufficient considerations (in case of carload shipment carriage of man or men in charge at reduced rate, or free, as rules may provide), hereby agrees to **Load said Live Stock at Point of Shipment, Unload and Reload at Resting Places, and Unload at Destination, and to Feed and Water at his Expense, and to Accompany and Attend Said Live Stock en route and to Destination.** Second party has examined the car or cars into which it is proposed to load such live stock, which is or are numbered and initialed as above, and accepts said car or cars as proper and suitable vehicles for transportation of the property for which this contract is issued, and hereby assumes all risk of loss or damage of or to said live stock or to the persons who may be in charge thereof, or which the animals may occasion themselves or each other, and all loss or damage resulting from heat, suffocation or climatic conditions, overcrowding in cars or steamers, burning of hay, straw or other material placed by shipper or any other person in car or steamer, as the case may be, for feed or other purposes, or which may be sustained by reason of delay incident to ordinary transportation; it being further understood and agreed between the parties hereto that first party does not undertake to forward said shipment of live stock by any particular train or boat, or in time for any particular market. When the transportation of said live stock between the points mentioned in this special agreement is by water, in the steamers of first party, or in case any part of the carriage of said live stock shall involve water transportation, second party, in addition to the foregoing, hereby assumes all risk of loss or damage attending the transfer of said live stock, whether in car or to or from car or steamer, and wharf corrals and steamer, or transfer boat, or from slipping or falling, or from or through breaking of corrals, or breaking of hatch coverings while on said steamer or transport boat, or from accidents or disasters incident to steam navigation, or dangers of the sea of whatsoever nature or kind. And second party hereby specially agrees that in no event is first party or its lessors to be liable for any loss of or damage to said live stock not proven to have been caused by the gross negligence of first party in the performance of or failure to perform some duty which, under the terms of this contract, is due from first party to second party as to said live stock.

It is further understood and agreed by second party that the live stock covered by this special agreement is to be transported subject to the conditions of State, Territorial or Federal laws governing the transportation, unloading and resting of live stock en route; and in case first party should, through its employees, furnish aid to assist in loading, caring for en route, unloading or transferring said live stock, said employees of first party so assisting or performing services shall be subject to the orders and deemed the employees of second party while so engaged, and not in any sense the agents of first party; and when live stock is in corrals at shipping point, resting place or destination, it shall be at owner's risk of loss or damage through breaking out of corrals or in loading and unloading.

Second party hereby further agrees that in case any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by second party on the Freight Claim Agent of first party in writing, within ten days after unloading of the live stock; and that in event of failure so to do all claims for loss or damage in the premises are hereby expressly waived, released and made void, and it is also expressly agreed by second party that the amount to be by him claimed for each animal as described herein, so lost or damaged, shall be adjusted on basis of value at time and place of shipment, not exceeding the declared value as hereinbefore set forth, and on which declared value the rate or rates of transportation hereinbefore named by first party are based, and in no event is there to be any recovery from first party or its lessors for any loss of or damage to said live stock, from whatsoever cause arising in excess of the declared value hereinbefore set forth.

It is hereby further understood and agreed by second party that in case the live stock herein described be destined to any point off the railroad of first party, or to a point beyond the destination to which rate is named herein, all common carriers engaged in the transporation of said live stock to destination of said live stock shall have and enjoy the special privileges and exemptions herein accorded to first party, when the rate or rates charged by such common carrier or carriers are conditioned on agreement limiting carriers' liabilities; provided, however, that the responsibility of first party, whether as common carrier or otherwise, shall cease and utterly determine upon arrival of said live stock at the station where the said live stock is to leave the road of first party in the course of transportation to destination. Provided, further, that Southern Pacific Company is not to be liable for any loss, damage or delay arising from any act or omission occurring before delivery of shipment to Southern Pacific Company by initial carrier.

First party hereby admits that it has received at the station and on the date first above written, from second party, certain live stock as hereinbefore described, to be transported as aforesaid at the rate or rates, and subject to the rules and conditions hereinbefore and hereinafter referred to; and agrees that said live stock will be delivered as aforesaid unto second party, or order, or assigns, subject to the conditions hereinbefore and hereinafter expressed, on the surrender of this instrument and payment of transportation charges, as agreed.

It is further expressly understood and agreed by second party that the live stock hereinbefore referred to is to be carried by first party subject to all terms and conditions set forth or referred to in the following described documents providing rules and regulations governing the transportation of live stock, and issued by the General Freight Department of first party, namely: (1) Circular G. F. D. 188-E, supplements thereto and reissues thereof, and known as "Rules and Regulations Governing the Transportation of Live Stock;" (2) All circulars at any time thereafter issued by said General Freight Department prior to the issuance of the present contract, in any way affecting the terms and conditions of the circulars above mentioned or any of them, or in any way affecting said rules and regulations for the transportation of live stock.

Jas Ford (EXHIBIT "C") J F Delaney

Shipper. Agent Southern Pacific Company.

27

ORIGINAL

SOUTHERN PACIFIC COMPANY
PACIFIC SYSTEM

LIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING

SPECIAL AGREEMENT

INSTRUCTIONS

Shippers or their agents must acquaint themselves with the rules and regulations governing the transportation of Live Stock as per G. F. D. Circular 188-E, supplements thereto and reissues thereof, and known as "Rules and Regulations Governing the Transportation of Live Stock," and the terms of said form of contract above mentioned.

ATTENDANTS

It is expressly understood and agreed that if Southern Pacific Company shall accept the shipment of live stock covered by this contract, unaccompanied by person to take care of such shipment, Southern Pacific Company is hereby released from all liability as to damage to or loss of said live stock, when resulting in whole, or in part, from lack of care or attention of an attendant while in transit.

Attendants accompanying Live Stock to destination and returning under conditions and rules of this Contract and Bill of Lading, also Circular G. F. D. No. 188-E, supplements thereto and reissues thereof, will be cared for as follows:

With 1 carload of Live Stock 1 man may accompany free, but not return free.

With 2 to 5 carloads.....1 man may accompany and return free

With 6 to 10 carloads.....2 men may accompany and return free

With 11 or more carloads.....3 men may accompany and return free

When more than one carload of stock is shipped account of one owner from different stations to one destination, on same train, man or men may accompany as per above, and will be entitled to return free as follows:

One man to the station where the second car was placed in train.

One additional man to the station where the sixth car was placed in train.

One additional man to the station where the eleventh car was placed in train.

Transportation will be furnished to persons in charge of Sheep, Hogs, Goats and Calves in DOUBLE-DECK CARS ON BASIS OF TWO SINGLE-DECK CARS as equivalent to one double-deck.

RETURN TRANSPORTATION

The man or men who may be entitled to return transportation free or at a reduced rate under carriers' rules in effect, published and posted as required by law, at time this contract was executed, will upon surrender of this contract to the carriers' agent, receive ticket or tickets for the return journey.

Return transportation of attendants in charge of Live Stock will not be honored unless the contract for return passage is presented within seven (7) days after arrival of Live Stock at destination; but on shipments of Horses, return transportation for attendants in charge of same will be honored if contract is presented within fifteen (15) days after arrival of Horses at destination; except that upon shipments originating at or destined to points beyond this Company's eastern terminals, namely, Portland, Ore., Ogden, Utah, and Rio Grande, N. M., return passage will be limited as follows:

When destined beyond this Company's Eastern Terminals, namely Portland, Ore., Ogden, Utah, and Rio Grande, N. M., return transportation will be furnished within 90 days after Live Stock passes said terminals. When originating at points beyond this Company's Eastern Terminals and destined to points west of said terminals, return transportation will be furnished within 30 days after arrival of Live Stock at destination.

When destined to points on connecting lines south of Portland, Ore., west of Ogden, Utah, and Rio Grande, N. M., return transportation will be furnished Caretakers entitled to such transportation, if contract is presented within fifteen (15) days after Live Stock passes junction point with connecting line.

VALUATION

Ordinary Live Stock will be received for transportation under the form of contract appearing upon the other side of this paper, subject to the following additional conditions: Shipments of Live Stock moving between points in Oregon will be received for transportation under the conditions of the "Low Value Live Stock Contract" and "Special Value Live Stock Contract."—(Uniform Live Stock Contract prescribed by the Railroad Commission of Oregon.) Rates as shown in the tariffs of this Company apply only on Ordinary Live Stock, that is, the actual and declared value of which does not exceed:

Each Horse (except Range Horses) or Pony (Gelding, Mare or Stallion), Mule or Jack	$100.00
Each Colt (under 1 year)	50.00
Each Ox, Bull or Steer	50.00
Each Cow	30.00
Each Calf	10.00
Each Hog	10.00
Each Sheep or Goat	3.00
Range Cattle, each animal	30.00
Range Horses, each animal	50.00

Values in excess of the foregoing will be considered extraordinary, and such Extraordinary Live Stock will be received and forwarded by this Company only under the form of Contract above mentioned and subject to increased charges as compared with Ordinary Live Stock, as follows:

When the actual and declared value exceeds that of Ordinary Live Stock, as shown above, the charges will be increased 10 per cent for each 100 per cent or fraction thereof increase in valuation.

Charge on animals of greater value in like proportion, but in no case will greater charge be made for other animals than for a horse of same valuation.

TIME OF LOADING

.....191..... Hour.....m.

Rested at .....

Date arrived ....., Hour.....m.

Date dep't'r ....., Hour.....m.

.....
Name of Consignee

TIME OF ARRIVAL AT.....
(Destination)

.....191..... Hour.....m.

TIME OF UNLOADING

.....191..... Hour.....m.

..... Agent

Executed by .....

at.....*Station, Date*.....191....

for.....*car.... of*.....*good for transportation of*

.....

.....

.....

Billing agent stamp here.

From .....*to* .....
when accompanying the stock herein described and not otherwise.

This Contract must be presented to Agent at.....*for renewal*

RELEASE FOR MAN OR MEN IN CHARGE

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract, without charge other than the sum stipulated therein, for the carriage of the live stock mentioned therein, the undersigned in charge do hereby, voluntarily, assume all risk of accident or damage to his (or their) person or property, and do hereby release and discharge the said carrier or carriers from every and all claim, liability and demand of every kind, nature and description, for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise.

SIGNATURE OF MAN OR MEN IN CHARGE		NO. MEN IN CHARGE	NO. CARS SHIPPED
1	One Man Only	1	(1) (2) (3) (4) (5)
2			
3			
Agents will punch No. and description of men in charge, No. of cars shipped, witness signatures and cancel unused spaces above.	Two Men Only	2	(6) (7) (8) (9) (10)
Witness	Three Men Only	3	(11) Or More

RECEIPT FOR THE RETURN TRANSPORTATION
FURNISHED ORIGINAL OR SUBSTITUTED LIVE STOCK ATTENDANTS

Received Ticket, Form.....No.....Date.....
1 From .....To .....
Signature.....

Received Ticket, Form.....No.....Date.....
2 From .....To .....
Signature.....

Received Ticket, Form.....No.....Date.....
3 From .....To .....
Signature.....

Slim	O	Young	O
Medium	O	Middle Age	O
Stout	O	Elderly	O
Short	O	Light Hair	O
Medium	O	Dark Hair	O
Tall	O	Gray Hair	O

SUBSTITUTED ATTENDANT

In case it becomes necessary for one of the persons in charge to leave train en route, substituting another in his place, such substitution must be made in presence of the Agent at station at which it occurs, who will cancel original signature and description and see that those of the substitute are properly affixed.

.....Substitutes .....
At .....
.....Agent

Slim	O	Young	O
Medium	O	Middle Age	O
Stout	O	Elderly	O
Short	O	Light Hair	O
Medium	O	Dark Hair	O
Tall	O	Gray Hair	O

Received Ticket, Form.....No.....Date.....
From .....To .....
Signature.....

Answer.

And not waiving its foregoing pleas, and for answer to plaintiff's complaint on file herein, defendant says:

I.

Admits that plaintiff is a resident of Maricopa County, Arizona, and alleges that the said plaintiff is now and was at the time of the commencement of this action and ever since has been a resident and citizen of the State of Arizona.

Admits that defendant is a corporation, and alleges that defendant is now, and was at the time of the commencement of this action and ever since has been a corporation duly organized, created by and existing under and by virtue of the laws of the State of Kentucky. That it is now and was at the time of the commencement of said action and ever since has been a nonresident of the State of Arizona, and is not now and was not at the time of the commencement of this action and never has been a citizen of the said State of Arizona.

Admits that it is now and was during the time mentioned in said complaint a common carrier engaged in the transportation of freight for hire.

II.

That heretofore, on or about July 1, 1913, this defendant, in its capacity as such common carrier, received from plaintiff at the town of San Luis Obispo, in the State of California, those certain 152 head of cows, more or less, being the same animals as men-

POOR COPY

tioned and described in plaintiff's complaint herein, for transportation over its said line of railroad and its connecting carrier, to wit, the Arizona Eastern Railroad Company, from the said town of San Luis Obispo to the city of Phoenix, in the State of Arizona. [30]

That in the course of such transportation and on July 2, 1913, at 2:35 P. M., the said cattle were by this defendant unloaded for feed and rest at the city of Los Angeles, State of California, a station on defendant's line of railroad, and thereafter, and without any unusual delay were again loaded into cars of this defendant, on July 3, 1913, at about 3:40 P. M., and were forwarded and transported by this defendant in its said cars, on its said line of railroad, from the said city of Los Angeles, without any unusual delay and without any negligence whatever on the part of defendant, to the town of Yuma, in the State of Arizona, a station on defendant's said line of railroad. That the cattle arrived at the said station of Yuma, in the State of Arizona, at about the hour of 10:35 A. M. of July 4, 1913.

That at the time said cattle so arrived at the said station of Yuma, in the State of Arizona, they had been confined in said cars for about twenty hours without feed or rest, and that it was absolutely necessary for defendant to unload said cattle at the said town of Yuma for feed and rest, in order to comply with the provisions of that certain Act of Congress entitled "An Act to Prevent Cruelty to Animals in Transit by Railroad or Other Means of Transportation From One State, Territory or the District of

Columbia into or Through Another State, Territory or the District of Columbia," etc., approved June 29, 1906, 34 Stat. L., p. 607; 1909 Supp. Fed. Stats. Anntd., p. 43.

That the defendant did so unload said cattle at the said station of Yuma for feed and rest for the purpose of complying with the provisions of said Act of Congress; and that without violating said Act of Congress it was impossible for defendant to have transported said cattle any farther than said station of Yuma, before unloading them for feed and rest, in this, to wit, that if said cattle had not been so unloaded, but had [31] been transported at destination, without unloading for feed and rest at Yuma, it would have resulted in the cattle having been confined in the cars without feed or rest for a period of time in excess of twenty-eight consecutive hours.

That the plaintiff did not, nor did anyone for him, upon the arrival of said cattle at the said town of Yuma, Arizona, or at any other time or place, file with or tender to this defendant or to any of its agents any written request, separate and apart from any printed bill of lading or other railroad form, extending the time which said animals could be confined from twenty-eight to thirty-six hours, as provided by said statute.

That defendant had at said time properly equipped stock-pens and stock corrals at a certain station on its said line or railroad known as Gila, Arizona, a distance of 123 miles easterly from the said town of Yuma and in the direction in which said cattle were being transported, but that neither this defendant

nor its said connecting carrier, the said Arizona Eastern Railroad Company, had at said time any stock-pens or corrals at the station of Maricopa, Arizona, the point at which said cattle were to be delivered by this defendant to its said connecting carrier, said Arizona Eastern Railroad Company, for transportation by said Arizona Eastern Railroad Company to destination, the said city of Phoenix, into which said cattle could have been unloaded for feed and rest.

That upon the arrival of said cattle at the said town of Yuma, Arizona, this defendant was willing and anxious and offered to transport said cattle for plaintiff on to the said station of Gila, upon its said line, there to be unloaded for feed and rest, but that plaintiff absolutely refused to permit defendant to do so.

That thereupon and immediately upon the arrival of said [32] cattle at said station of Yuma, Arizona, on July 4, 1913, at about 10:35 A. M., this defendant notified its said connecting carrier, to wit, said Arizona Eastern Railroad Company, by telegraph, that said cattle were then at said town of Yuma, en route to Phoenix, Arizona, and requested information from the said Arizona Eastern Railroad Company if it could handle said cattle if this defendant should transport said cattle on to said station of Maricopa from the said town of Yuma without feed or rest, and the said Arizona Eastern Railroad Company notified, advised and informed this defendant that it could not so handle said cattle from the said station of Maricopa, Arizona, to the place of destination, to wit, Phoenix, Arizona, and that it,

the said Arizona Eastern Railroad Company, did not and would not have any facilities at the said station of Maricopa, upon the arrival of said freight-train so containing said cattle, if the said cattle should be brought to the said station of Maricopa without unloading for feed and rest, to enable it, the said Arizona Eastern Railroad Company to transport said cattle from the said station of Maricopa to destination at Phoenix, Arizona, within thirty-six hours from the time said cattle were so loaded at the said city of Los Angeles, State of California, as hereinbefore set forth; and that by reason of the foregoing facts it was necessary for this defendant, in order to comply with the said Act of Congress known as the twenty-eight hour law, to unload said cattle at the said town of Yuma for feed and rest, even though plaintiff had filed with this defendant a written request, as provided by said Act, extending the time which said animals could be confined from twenty-eight to thirty-six hours, which this defendant specifically denies.

That at the time of the arrival of said cattle at the said town of Yuma, on account of the extreme heat at that place [33] and of the country through which they had been transported, they were in no condition to be kept in the cars any longer and were in no condition to withstand any further shipment without feed and rest.

That defendant thereafter, and on the same day, to wit, July 4, 1913, reloaded said cattle into its said cars at the said station of Yuma and forwarded the same to destination over its said line of railroad and

the line of its connecting carrier, to wit, the Arizona Eastern Railroad, to the city of Phoenix, State of Arizona, without any unusual delay and without any negligence whatsoever on its part.

That by reason thereof plaintiff is not entitled to recover any damages from this defendant for the matters and things set forth in his said complaint.

III.

Defendant alleges that heretofore, on or about July 1, this defendant, as a common carrier, received from plaintiff, at the town of San Luis Obispo, in the State of California, those certain 152 head of cows, as mentioned and described in plaintiff's complaint, for transportation in five cars to the city of Phoenix, in the State of Arizona, over the line of railroad operated by this defendant and its connecting carriers, under three certain contracts in writing, then and there made and entered into by and between plaintiff and his duly authorized agents, to wit, one Frank E. Whitten and one James Ford, and this defendant, which said contracts were identical in form and the contents of each were the same with the exception that one of said contracts was executed by the said Frank R. Stewart in person, and covered sixty head of said cattle contained in two of said cars; one of said contracts was executed by the said Frank E. Whitten, the duly authorized agent of and [34] *and* for and on behalf of said Frank R. Stewart, the owner of said cattle, and covered sixty-two head of said cattle; contained in two of said cars; and the other of said contracts was executed by the said James Ford, the duly authorized

agent of and for and on behalf of the said Frank R. Stewart, the owner of said cattle, and covered thirty head of said cattle contained in one of said cars, true and correct copies of which said contracts are annexed to defendant's second plea in bar herein, and being the same contracts referred to in said plea in bar, and are now here made a part of this answer as though the same were again set forth *in haec verba.*

That in transporting said shipment of cattle this defendant and its connecting carrier fully performed each and every act upon their part required to be performed by the terms and provisions of said contracts and by the published freight tariffs governing such shipments, and if any loss or injury occurred to said livestock, as alleged in plaintiff's complaint, all of which this defendant expressly denies, this defendant is exempt from liability therefor under the terms and stipulations set forth in said agreements.

That under and by virtue of the terms of said contracts and each of them plaintiff herein agreed and bound himself that in case any loss or damage should be sustained for which this defendant might be liable that then this plaintiff should make demand or claim therefor in writing to the freight claim agent of this defendant within ten days after the unloading of said cattle at destination, to wit, at the city of Phoenix, State of Arizona, and that in the event of the failure of plaintiff so to do all claims for loss or damage in the premises were thereby expressly waived, released and made void.

That said cattle were unloaded by plaintiff and

received [35] and taken and driven away by him on the 5th day of July, 1913, at destination, to wit, at the city of Phoenix, Arizona, and that plaintiff did not, nor did anyone for him or on his behalf, within ten days after so unloading said cattle at said destination, make any demand or claim in writing to the freight claim agent of this defendant or to this defendant or to any agent of this defendant company for any loss or damage to said shipment of cattle.

That it was entirely possible for plaintiff to have given such notice, and that this defendant at all the times mentioned in plaintiff's complaint had an agent at the said city of Phoenix, State of Arizona, at the place where said cattle were unloaded, as set forth in plaintiff's complaint, and that defendant had at all of said times many agents in the State of Arizona, and in the State of California, to whom such notice could have been given.

That by reason of the failure of plaintiff or anyone for him or on his behalf to make any claim in writing within ten days after the unloading of said cattle to the freight claim agent of this defendant or to any agent of this defendant, as aforesaid, for any loss or damage to any of said cattle that plaintiff thereby expressly waived and released any and all claims whatsoever on account of any loss or damage to said cattle, if said cattle were damaged as alleged, against this defendant.

That by reason of the failure of plaintiff to give such notice in manner and form as required by said agreement that he is not entitled to recover on his

said alleged claim and should not be permitted to maintain this action.

IV.

That heretofore, on or about July 1, 1913, this defendant, as a common carrier, received from plaintiff at the town of [36] San Luis Obispo, in the State of California, those certain 152 head of cows as mentioned and described in plaintiff's complaint, for transportation, in five cars, to the city of Phoenix, in the State of Arizona, over the lines of railroad operated by this defendant and its connecting carrier, to wit, the Arizona Eastern Railroad Company, under those certain contracts in writing above referred to.

That said contracts and each of them were fairly made and entered into between plaintiff and his duly authorized agents and this defendant and that by reason of the execution thereof and in consideration of the same plaintiff obtained a lower published freight tariff rate for said shipment that would have been otherwise assessed thereon and therefor, and that the difference between said freight rate so assessed on said shipment by reason of the execution of said contracts and the higher published tariff rate which would have been applicable thereto had said contracts not been entered into is reasonable and in proportion to the liability of the defendant under the stipulation contained in said contracts.

That in transporting said shipment of cattle this defendant and its said connecting carrier fully performed each and every act upon their part required to be performed by the terms and provisions of said

contracts and the published tariffs governing such shipments.

That under and by virtue of the terms of said contracts so made and entered into by and between plaintiff and his duly authorized agents and this defendant as hereinbefore set forth the plaintiff then and there stipulated that the agreed valuation of said livestock, as stated in said contracts, was the sum of thirty dollars per head.

That said agreed valuation was made and placed upon said [37] cattle by plaintiff for and in consideration of a cheaper and lower freight rate obtained on said shipment and that plaintiff then and there agreed that in any event there should be no recovery for loss or damage on said livestock in excess of said declared valuation of thirty dollars per head.

Wherefore, and by reason thereof, plaintiff is not entitled to recover in this action, in any event, anything over and above said sum of thirty dollars per head for any of said animals so alleged to have been lost or damaged.

V.

Defendant specifically denies that said animals were robust, healthy and in every way in first-class physical condition at the time said animals were delivered to it at San Luis Obispo, California, for transportation to Phoenix, Arizona; but alleges that at the time said animals were so delivered to this defendant at said place they were in a poor, weak and starved condition, due to the condition of the feed

and ranges in the country and vicinity from which the said animals were obtained by plaintiff, to wit, the country and vicinity in and around San Luis Obispo, State of California.

Defendant denies on information and belief that said animals were dairy cows, as alleged by plaintiff, but that it is informed and believes and upon such information and belief alleges that plaintiff purchased said cows at said city of San Luis Obispo, State of California, and in the vicinity thereof because same could be purchased very cheaply on account of there being no feed in said country and on account of the cows being in a poor, weak and starved condition.

Defendant further alleges that the climatic conditions of the country and vicinity in and around San Luis Obispo, State of California, where the said animals mentioned and described [38] by plaintiff were bred and raised, and from where plaintiff obtained said animals, are entirely different from the climatic conditions in and around Yuma, Arizona, and Phoenix, Arizona, and especially during the summer months, in this, to wit, that the climate of the country in and around San Luis Obispo, Calif., and the place where said animals were bred and raised, and from where the plaintiff obtained the said animals is and was at the time plaintiff so obtained the said animals cool and moist as compared with the climatic conditions which existed at that time, in the month of July, in and around Yuma and Phoenix, Arizona, all of which was well known to plaintiff at the time he so shipped said animals; and

if any loss or injury resulted to any of said animals, which this defendant expressly denies, that such loss or injury was wholly caused by plaintiff bringing said animals, in their then condition, as above set forth, from a cool moist climate, such as that time existed in and around San Luis Obispo, California, into an extremely hot and dry climate in Arizona.

VI.

That defendant is informed and believes and upon such information and belief alleges that immediately upon the arrival of said cattle at destination, to wit, at the city of Phoenix, Arizona, on July 5, 1913, over the line of railroad of defendant's connecting carrier, to wit, the Arizona Eastern Railroad, plaintiff took and drove all of said animals away without paying any of the freight charges due and owing to this defendant and its said connecting carrier for the transportation of said cattle, and without paying for the feed so provided by this defendant to said cattle in the course of said shipment, and that plaintiff has not prior to the commencement of this action, or at all, paid such freight or feeding charges, and [39] defendant is advised and informed and therefore alleges that by reason thereof plaintiff is not entitled to recover from this defendant for the matters and things set forth in his complaint herein.

VII.

Defendant denies generally each and every allegation in said complaint contained not herein expressly admitted.

WHEREFORE, defendant prays that plaintiff take nothing by his action herein, and that it have judgment for its costs.

FRANCIS M. HARTMAN,
Tucson, Arizona.
J. C. FOREST,
Phoenix, Arizona,
Attorneys for Defendant.

[Endorsements]: No. 142 (Phx.) In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Coropration, Defendant. Defendant's Second Amended Pleas and Answer. Service of Copy Admitted this 11th Day of October, 1915. Hayes & Laney, Attys. for Plff. Filed Oct. 11, 1915, at —— M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [40]

In the United States District Court for the District of Arizona.

FRANK R. STEWART,
Plaintiff,
vs.
SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Reply to Defendant's Second Amended Pleas and Answer.

REPLY TO DEFENDANT'S FIRST PLEA IN BAR AS SET FORTH IN HIS FIRST AMENDED ANSWER HEREIN.

Comes now the plaintiff, by Messrs. Hayes &

Laney, his attorneys, and replying to defendant's first plea in bar, demurs thereto, and for grounds of his demurrers says:

I.

That defendant has not in and by its first plea in bar, set forth facts sufficient to bar plaintiff's right of recovery upon his complaint herein.

II.

That the matters and things set forth in defendant's first plea in bar, are purely defensive matter, and fully set forth and pleaded as defensive matter in defendant's second amended answer herein, and are insufficient in themselves if taken as confessed, to constitute a complete defense to plaintiff's complaint herein.

WHEREFORE, plaintiff prays that defendant take nothing by reason of its first plea of bar herein, and that its said plea be dismissed.

HAYES & LANEY,
Attorneys for Plaintiff. [41]

Should the foregoing demurrers be overruled then plaintiff for reply to defendant's first plea in bar, admits the allegations contained in the first and second paragraphs thereof, and further replying to said plea, plaintiff denies that said cattle were loaded into the cars of the defendant at Los Angeles, California, on the 3d day of July, 1913, at about the hour of 3:40 P. M. and in that behalf alleges that said cattle were so loaded at approximately the hour of 4:40 P. M., and moved out of said station of Los Angeles, at about the hour of 5:30 P. M., and further replying, plaintiff denies that said cattle arrived at

the station of Yuma, Arizona, at the hour of 10:35 A. M. of the 4th day of July, 1913, and in that behalf alleges that said shipment arrived at the station of Yuma, at approximately 9:00 A. M. of said 4th day of July, 1914.

Plaintiff denies that at the time of the arrival of said shipment at Yuma, Arizona, they had been confined in said cars for a period of twenty hours without feed or rest, and in that behalf alleges that said shipment was so confined for the period of approximately sixteen hours and twenty minutes and no more. Plaintiff denies that it was absolutely necessary, or at all necessary, for defendant to unload said cattle at the town of Yuma, for feed and rest in order to comply with the provisions of the Act of Congress referred to in defendant's first plea in bar. Plaintiff admits that to have forwarded said cattle to Phoenix, Arizona, without unloading for feed and rest, would have caused them to be confined in the defendant's cars for a period slightly in excess of twenty-eight hours, viz.: for a period of approximately twenty-nine hours.

Further replying, plaintiff denies that he did not upon the arrival of said cattle at the town of Yuma, file with or tender to the defendant or its agent, a request in writing separate and apart from any printed bill of lading or other [42] railroad form, extending the time which said animals could be confined, from twenty-eight to thirty-six hours, as provided by said Statute.

Further replying, plaintiff admits that the defendant had at the time of said shipment, properly

equipped stock-pens and corrals at the station of Gila, Arizona, a distance of one hundred and twenty-three miles easterly from said town of Yuma, and alleges that said shipment could have been forwarded by the defendant, without in anywise violating the provisions of the so-called twenty-eight hour law. Further replying, plaintiff denies that the defendant expressed a willingness or anxiety to, or in anywise offered to transport said cattle to the said station of Gila; and further denies that he, the plaintiff, refused to permit the forwarding of said shipment to said station of Gila; and in that behalf alleges that the agent of the defendant neither offered to transport said cattle or even mentioned the name of said station, and alleges that the said agent of the defendant made no proposition conditionally or otherwise, to move said shipment for any distance whatsoever, beyond the station of Yuma, before unloading the same.

Further replying, the plaintiff is reliably informed and believes, and upon such information denies that the defendant notified its connecting carrier, the Arizona Eastern Railroad Company, by telegraph or otherwise, that said cattle were at the town of Yuma en route to Phoenix; and further denies that the defendant requested information from said Arizona Eastern, as to whether it could handle said cattle if the defendant should transport them to the station of Maricopa without feed and rest, and denies that the Arizona Eastern Railroad Company notified, advised or informed the defendant that it

could not so handle said cattle from the said station [43] of Maricopa, to place of destination at Phoenix, Arizona, within thirty-six hours from the time said cattle were loaded at the city of Los Angeles, California, but in that behalf alleges that said Arizona Eastern Company had at the time said shipment arrived at Yuma, completed arrangements with this plaintiff for meeting said shipment at Maricopa, and did actually proceed to Maricopa with its said train, which said train was in fact waiting at Maricopa to receive said shipment at the time the freight train on which said shipment arrived at Yuma, passed through the station of Maricopa.

Further replying, plaintiff denies that at the time of the arrival of said cattle at the town of Yuma, by reason of the heat at that place and the country through which said cattle had been transported or otherwise, they were in no condition to be kept longer in defendant's cars, and denies that they were not, upon their arrival at said town of Yuma, in proper condition to withstand further shipment without feed and rest, but in that behalf alleges that said shipment arrived at Yuma in good condition and that had said cars been moved forward without unloading at said station, the injuries to said cattle and the loss to the plaintiff as set forth in his said complaint herein, would not have been sustained.

For a further reply to said first plea in bar, plaintiff alleges that at the time of loading said shipment of cattle at San Luis Obispo, California, for shipment to Phoenix, as set forth in his complaint

herein, said cattle were healthful, in good flesh, and in every respect in first-class shipping condition; that because of the length of time said cattle would be confined in the defendant's cars in their transportation from Los Angeles to the city of Phoenix, in accordance with the arrangements set forth in plaintiff's [44] complaint, and hereinafter more fully set forth, plaintiff caused said cattle to be unloaded at the city of Los Angeles, in the defendant's stockyards for feed and rest, for a period of approximately twenty-six hours, and at the time of reloading said cattle at Los Angeles, they had been well fed, watered and rested, and were in first-class condition to withstand shipment from said station to the city of Phoenix, Arizona.

That prior to moving said cattle from Los Angeles, the plaintiff had arranged with the Arizona Eastern Railroad, the defendant's delivering carrier, in said shipment, to have said cattle immediately upon their arrival at Maricopa, Arizona, attached to a fast passenger train of said Arizona Eastern railroad, and immediately transported to their destination at Phoenix, Arizona; that had said cattle been handled in accordance with the plaintiff's arrangements made as aforesaid, and in keeping with plaintiff's instructions to the defendant's agents at the town of Yuma, as set forth in plaintiff's complaint, and hereinafter more fully referred to, said cattle would have arrived at Phoenix, Arizona, at the hour of 9:30 in the evening of said July 4th, 1913, after having been confined in defendant's

cars for a period of twenty-eight hours and fifty minutes. That the freight train to which plaintiff's shipment was attached, did, after consuming approximately one and a half hours at the station of Yuma, for the unloading of plaintiff's cattle, arrive at the station of Maricopa at about 7:15 P. M. of said 4th day of July, 1913.

For a further reply, plaintiff alleges that had said shipment been moved from the station of Yuma without unloading, and should unavoidable delays have necessitated the unloading of said cattle prior to arrival at Phoenix, Arizona, in order to comply with the Act referred to by defendant, the defendant had other feeding stations between said town of Yuma and the [45] city of Phoenix, Arizona, at which said cattle could have been unloaded.

For a further reply, plaintiff alleges that upon the arrival of his said shipment at the station of Yuma, the weather at said station was extremely hot, the stock-pens maintained by the defendant company at said station, very dusty, and entirely without shade of any character, and in no wise properly and suitably equipped for receiving said shipment for feed and rest, under the climatic conditions then existing at said station of Yuma; that the defendant owed to this plaintiff, the duty of maintaining suitably equipped pens in which to receive his said stock for feed, water and rest; that at the tme of the arrival of said cattle at Yuma, the plaintiff informed and advised the defendant that its said feeding and rest pens were not suitably equipped to receive his

said shipment under the weather conditions then prevailing at said station, and that said cattle could not be unloaded and received in said pens in a proper and humane manner; and further advised the defendant that said cattle had been well fed, watered and rested at Los Angeles; that he had made arrangements with the Arizona Eastern Railroad Company to receive said shipment promptly on arrival at Maricopa, Arizona, and that said cattle could be shipped to Phoenix without injuring said shipment, and upon the refusal of the defendant to comply with plaintiff's request, that said shipment be moved forward in accordance with the arrangement he had made for the handling of said shipment, the plaintiff then and there delivered to the defendant's agents at said station of Yuma, the telegraph arrangements he had theretofore made with the Arizona Eastern Railroad Company, for the immediate forwarding of said cattle to Phoenix, Arizona, upon their arrival at Maricopa, Arizona, and [46] further tendered a request in writing, separate and apart from his shipping contract, extending the time to the defendant for unloading and resting said cattle, to the period of thirty-six hours from the date of loading said cattle in Los Angeles and further agreed and tendered said agent in writing, a full release from all liability for damage to the said plaintiff, resulting from the forwarding of said cattle, which said tender was refused by the defendant, through its said agents.

WHEREFORE, plaintiff prays that defendant

take nothing by reason of its first plea in bar herein.

HAYES & LANEY,
Attorneys for Plaintiff.

REPLY TO DEFENDANT'S SECOND PLEA IN BAR, AS SET FORTH IN DEFENDANT'S SECOND AMENDED ANSWER HEREIN.

Replying to defendant's second plea in bar herein, plaintiff demurs thereto, and for grounds of his demurrers, says:

I.

That defendant has not in and by its second plea in bar, set forth facts sufficient to bar plaintiff's right of recovery upon his complaint herein.

II.

That the matters and things set forth in defendant's second plea in bar, are purely defensive matter, and fully set forth and pleaded as defensive matter in defendant's second amended answer herein, and are insufficient in themselves if taken as confessed, to constitute a complete defense to plaintiff's complaint herein. [47]

WHEREFORE, plaintiff prays that defendant take nothing by reason of its second plea of bar herein, and that its said plea be dismissed.

HAYES & LANEY,
Attorneys for Plaintiff.

Should the foregoing demurrers be overruled, then for his reply to defendant's second plea in bar, plaintiff admits the transportation of his said cattle in five cars, from San Luis Obispo, California, to Phoenix, Arizona, over the line of railroad operated by the

defendant and its connecting carrier, the Arizona Eastern, under three contracts in writing made and entered into between the plaintiff and his duly authorized agents, Frank Whitton and James Ford, and the defendant, but has no information upon which to base a belief that the copies attached to defendant's second plea in bar, are true copies of the original contracts entered into between the plaintiff and his agents and the defendant, and therefore denies that said copies are correct copies of the original shipping contracts.

Further replying, plaintiff denies that in the handling of said shipment, the defendant and its connecting carrier fully performed each and every act required to be performed by them under the provisions of their said shipping contracts and the published freight tariffs governing said shipments, and further denies that the defendant is exempt from liability for the losses and injuries to said livestock, as set forth in plaintiff's complaint, under the terms of said shipping contracts or otherwise, or at all.

Further replying, plaintiff admits that said shipping contracts entered into between plaintiff and his agents and the defendant, contain a proviso that in case any loss or damage should be sustained for which defendant might be liable, [48] that plaintiff would make demand or claim therefor in writing, to the freight claim agent of the defendant, within ten days after the unloading of said cattle at Phoenix, Arizona, and that said contracts contain the further proviso that in the event of the failure of the plaintiff so to do, all claims for losses or dam-

ages in the premises, were waived, released and made void, but this plaintiff denies that he assented to the terms of said provisos or either of them;

Plaintiff admits that said cattle were unloaded and received by him on the 5th day of July, 1913, at the city of Phoenix, and admits that he did not nor did any person else to plaintiff's knowledge or on his behalf, make demands or claim in writing within said ten day period, to the freight claim agent of the defendant, or to the defendant or to any agent of the defendant, for the loss or damage sustained by him in said shipment; and

Further replying, plaintiff denies that it was entirely possible or at all possible for him to have given such notice in writing or at all, to the defendant or to its agents within said ten day period, after the unloading of said cattle, for the reasons hereinafter more fully set forth; and further replying, plaintiff denies that by reason of his failure or the failure of any person for him or on his behalf, to make such claim in writing within ten days after the unloading of said cattle, he waived or released all or any portion of his said claims against the defendant on account of the loss or damage to his said shipment, as set forth in his said complaint.

Further replying, plaintiff alleges that on the 4th day of July, 1913, and at all times subsequent to the arrival of said cattle at the station of Yuma, Arizona, the defendant had full knowledge and notice of the injuries and damage to [49] plaintiff's cattle as set forth in his said complaint; that said cattle were unloaded by the defendant into its stock-pens

at the station of Yuma, between the hours of nine and ten o'clock A. M. on the 4th day of July, 1913, and between said date and the hour of 7:30 P. M. of said day, and prior to the reloading of said cattle into the defendant's cars, five of said cows died; that said cattle remained in the defendant's stock-pens at Yuma from about the hour of 10:00 A. M. of said 4th day of July, 1913, to 7:30 P. M. of said day, without any shelter or protection whatsoever from the intense heat of the sun, and were nursed and cared for during said entire period by the defendant's agents, assisted by one James Ford; that upon loading said cattle it became necessary to provide, and the defendant did provide, an additional car in which to *hip* thirteen of the sick and crippled cattle of the plaintiff to their destination at Phoenix; that at various points between the said station of Yuma and the city of Phoenix, the train officials in charge of said shipment, received telegraphic inquiries from other officials of the defendant, inquiring as to the condition and welfare of said shipment; that upon the arrival of said shipment at Phoenix, Arizona, one of said crippled animals remained in defendant's car for a period of more than a week, and that immediately after the unloading of said shipment at Phoenix, Arizona, and almost daily from said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizona Eastern Railroad Company and of this defendant, were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the one hundred and forty-seven (147) head of plaintiff's

cows which arrived at the destination alive, were such as to render it impossible for this plaintiff or any person else in the exercise of due care and diligence, to determine the amount and extent of damage sustained [50] by the plaintiff, within said ten day period; that a number of said cattle died many days after their arrival at Phoenix, Arizona, as the result of said injuries.

That on or about the 21st day of October, 1913, and after repeated efforts to arrive at any determination with the defendant and its delivering carrier, as to the extent and amount of damages sustained by the plaintiff, the plaintiff made demand in writing upon the defendant for the sum of Fifteen Hundred and Seventy Dollars ($1,570) in satisfaction of the damages accrued to him at that time by reason of the acts of negligence set forth in his complaint, which said demand was refused. That thereafter and on, to wit, the 15th day of December, 1913, and as soon as plaintiff was able to ascertain the nature and extent of the injury and damage to his cattle as set forth in his complaint, he again made written demand upon the defendant for the sum of Twenty-six Hundred and Ninety-five Dollars ($2,695) in full satisfaction of the damage and injuries sustained by him in the manner set forth in his said complaint, which demand was refused.

Further replying, plaintiff alleges that defendant has repeatedly waived the requirements on the part of plaintiff that he make said demand in writing within said ten-day period, in this, to wit, that defendant has on many occasions prior to the 21st day of Oc-

tober, 1913, recognized plaintiff's right to a recovery in some amount on account of his damages sustained as set forth in his complaint, and has on many occasions attempted to settle and compromise said claim with the plaintiff; that subsequent to the giving of the notice in writing on the 21st day of October, 1913, and the 15th day of December, 1913, as above set forth, defendant has attempted on two different occasions through its claim agents, [51] to adjust with plaintiff the loss and damage sustained by him as set forth in his said complaint.

WHEREFORE, plaintiff prays that defendant take nothing by reason of its second plea in bar.

HAYES & LANEY,
Attorneys for Plaintiff.

Answer.

Comes now the plaintiff in the above-entitled action, and not waiving his demurrers to defendant's pleas in bar herein, files this his amended reply to the affirmative matter set up by defendant in his second amended answer herein, by way of answer to plaintiff's complaint.

I.

For reply to paragraph number II of defendant's second amended answer, plaintiff admits that his said shipment of cattle arrived at the city of Los Angeles, California, on the 2d day of July, 1913, at about the hour of 2:35 P. M., and admits that said cattle were unloaded for feed and rest at said city, but denies that said cattle were again loaded at 3:40 P. M. on July 3, 1913, and in that behalf alleges that said cattle were reloaded at 4:40 P. M. on said date,

and moved out of said station at about the hour of 5:30 P. M., and

Further replying to said portion of the defendant's second amended answer, number II, plaintiff denies that said cattle arrived at the station of Yuma, Arizona, at about the hour of 10:35 A. M. of the 4th day of July, 1913, and in that behalf alleges that said shipment arrived at said station at about the hour of 9:00 A. M. on said day; and further replying, denies that at the time of the arrival of said cattle at Yuma, they had been confined in said cars for about twenty hours without feed and rest, and alleges that they were so confined for [52] the period of sixteen hours and twenty minutes, and no more, and plaintiff further replying, denies that it was absolutely necessary or at all necessary for the defendant company to unload said cattle at the town of Yuma for feed and rest, in order to comply with the Act of Congress therein referred to.

Further replying, plaintiff admits that defendant unloaded said cattle at the station of Yuma, but denies that defendant could not have transported said cattle beyond the station of Yuma before unloading them for feed and rest, without violating the Act of Congress referred to by defendant. Further replying, plaintiff admits that had said cattle been transported from the station of Los Angeles, to the city of Phoenix, without unloading them for feed and rest, they would have been confined in the defendant's cars for a period of approximately twenty-nine hours and no more.

Further replying, plaintiff denies that at the time

of the arrival of said cattle at Yuma, said cattle were in no condition to be kept longer in the defendant's cars, or to withstand further shipment without feed and rest, on account of the heat at Yuma and the country through which said cattle had been transported, or for any other reason.

Further replying, plaintiff denies that he did not upon the arrival of said cattle at the town of Yuma, file with the defendant or its agents, a request in writing separate and apart from any printed bill of lading or other railroad form, extending the time which said animals could be confined, from twenty-eight to thirty-six hours. Further replying, plaintiff admits that defendant had at the time of said shipment, stock-pens and corrals at the station of Gila, on its said line a distance of approximately 123 miles easterly from the town of Yuma, and in the direction in which said cattle were being transported, and admits that said company [53] did not have at said time, stock-pens or corrals at the station of Maricopa.

Further replying, plaintiff denies that upon the arrival of his said shipment at the town of Yuma, defendant either expressed a willingness or anxiety, or offered to transport his said cattle to the station of Gila, without unloading at said station of Yuma, for feed, water and rest, and further denies that he refused to permit the defendant to so forward said shipment; and in that behalf alleges that neither the agent of the defendant, nor any person in his behalf offered to transport said cattle to the station of Gila, and further alleges that the said agent of the defend-

ant made no proposition conditional or otherwise, to move said shipment for any distance whatsoever, beyond the station of Yuma, before unloading the same.

Further replying, the plaintiff is reliably informed and believes, and upon such information denies that the defendant notified its connecting carrier, the Arizona Eastern Railroad Company, by telegraph or otherwise, that said cattle were at the town of Yuma en route to Phoenix; and further denies that the defendant requested information from said Arizona Eastern, as to whether it could handle said cattle if the defendant should transport them to the station of Maricopa without feed and rest, and denies that the Arizona Eastern Railroad Company notified, advised or informed the defendant that it could not so handle said cattle from the said station of Maricopa, to place of destination at Phoenix, Arizona, within thirty-six hours from the time said cattle were loaded at the city of Los Angeles, California, but in that behalf alleges that said Arizona Eastern Company had at the time said shipment arrived at Yuma, completed arrangements with this plaintiff for meeting said shipment at Maricopa, [54] and did actually proceed to Maricopa with its said train, which said train was in fact in waiting at Maricopa to receive said shipment at the time the freight train on which said shipment arrived at Yuma, passed through the station of Maricopa.

Further replying, plaintiff denies that at the time of the arrival of said cattle at the town of Yuma, by reason of the heat at that place and the country

through which said cattle had been transported or otherwise, they were in no condition to be kept longer in defendant's cars, and denies that they were not upon their arirval at said town of Yuma, in proper condition to withstand further shipment without feed and rest, but in that behalf alleges that said shipment arrived at Yuma in good condition and that had said cars been moved forward without unloading at said station, the injuries to said cattle and the loss to the plaintiff as set forth in his said complaint herein, would not have been sustained.

For a further reply to said paragraph numbered II of defendant's second amended answer, plaintiff alleges that at the time of loading said shipment of cattle at San Luis Obispo, California, for shipment to Phoenix, as set forth in his complaint herein, said cattle were healthful, in good flesh, and in every respect in first-class shipping condition; that because of the length of time said cattle would be confined in the defendant's cars in their transportation from Los Angeles to the city of Phoenix, in accordance with the arrangements set forth in plaintiff's complaint, and hereinafter more fully set forth, plaintiff caused said cattle to be unloaded at the city of Los Angeles, in the defendant's stockyards for feed and rest, for a period of approximately twenty-six hours, and at the time of reloading said cattle at Los Angeles, they had been well fed, watered and rested, and were in first-class condition [55] to withstand shipment from said station to the city of Phoenix, Arizona.

That prior to moving said cattle from Los Angeles, the plaintiff had arranged with the Arizona

Eastern Railroad, the defendant's delivering carrier, in said shipment, to have said cattle immediately upon their arrival at Maricopa, Arizona, attached to a fast passenger train of said Arizona Eastern Railroad, and immediately transported to their destination at Phoenix, Arizona; that had said cattle been handled in accordance with the plaintiff's arrangements made as aforesaid, and in keeping with plaintiff's instructions to the defendant's agents at the town of Yuma, as set forth in plaintiff's complaint, and hereinafter more fully referred to, said cattle would have arrived at Phoenix, Arizona, at the hour of 9:30 in the evening of said July 4th, 1913, after having been confined in defendant's cars for a period of twenty-eight hours and fifty minutes. That the freight train to which plaintiff's shipment was attached, did after consuming approximately one and a half hours at the station of Yuma, for the unloading of plaintiff's cattle, arrive at the station of Maricopa at about 7:15 P. M. of said 4th day of July, 1913.

For a further reply, plaintiff alleges that had said shipment been moved from the station of Yuma without unloading, and should unavoidable delays have necessitated the unloading of said cattle prior to arrival at Phoenix, Arizona, in order to comply with the Act referred to by defendant, the defendant had other feeding stations between said town of Yuma and the city of Phoenix, Arizona, at which said cattle could have been unloaded.

For a further reply, plaintiff alleges that upon the arrival of his said shipment at the station of Yuma,

the weather at said station was extremely hot, the stock-pens [56] maintained by the defendant company at said station, very dutsy, and entirely without shade of any character, and in no wise properly and suitably equipped for receiving said shipment for feed and rest, under the climatic conditions then existing at said station of Yuma; that the defendant owed to this plaintiff, the duty of maintaining suitably equipped pens in which to receive his said stock for feed, water and rest; that at the time of the arrival of said cattle at Yuma, the plaintiff informed and advised the defendant that its said feeding and rest pens were not suitably equipped to receive his said shipment under the weather conditions then prevailing at said station, and that said cattle could not be unloaded and received in said pens in a proper and humane manner; and further advised the defendant that said cattle had been well fed, watered and rested at Los Angeles; that he had made arrangements with the Arizona Eastern Railroad Company to receive said shipment promptly on arrival at Maricopa, Arizona, and that said cattle could be shipped to Phoenix without injuring said shipment, and upon the refusal of the defendant to comply with plaintiff's request, that said shipment be moved forward in accordance with the arrangement he had made for the handling of said shipment, the plaintiff then and there delivered to the defendant's agents at said station of Yuma, the telegraph arrangements he had theretofore made with the Arizona Eastern Railroad Company, for the immediate forwarding of said cattle to Phoenix, Arizona, upon

their arrival at Maricopa, Arizona, and further tendered a request in writing, separate and apart from his shipping contract, extending the time to the defendant for unloading and resting said cattle, to the period of thirty-six hours from the date of loading said cattle in Los Angeles, and further agreed and tendered said agent in [57] writing, a full release from all liability for damage to the said plaintiff, resulting from the forwarding of said cattle, which said tender was refused by the defendant, through its said agents.

II.

For reply to paragraph numbered III of defendant's second amended answer, plaintiff admits the transportation of his said cattle in five cars, from San Luis Obispo, California, to Phoenix, Arizona, over the line of railroad operated by the defendant and its connecting carrier, the Arizona Eastern, under three contracts in writing made and entered into between the plaintiff and his duly authorized agents, Frank Whitton and James Ford, and the defendant, but has no information upon which to base a belief that the copies attached to defendant's second plea in bar, are true copies of the original contracts entered into between the plaintiff and his agents and the defendant, and therefore denies that said copies are correct copies of the original shipping contracts.

Further replying, plaintiff denies that in the handling of said shipment, the defendant and its connecting carrier fully performed each and every act required to be performed by them under the provisions of their said shipping contracts and the published

freight tariffs governing said shipments, and further denies that the defendant is exempt from liability for the losses and injuries to said livestock, as set forth in plaintiff's complaint, under the terms of said shipping contracts or otherwise, or at all.

Further replying, plaintiff admits that said shipping contracts entered into between plaintiff and his agents and the defendant, contain a proviso that in case any loss or damage should be sustained for which the defendant might be liable, that plaintiff would make demand or claim therefor in writing, to the freight claim agent of the defendant, within ten days [58] after the unloading of said cattle at Phoenix, Arizona, and that said contracts contain the further proviso that in the event of the failure of the plaintiff so to do, all claims for losses or damages in the premises, were waived, released and made void, but this plaintiff denies that he assented to the terms of said provisos or either of them.

Plaintiff admits that said cattle were unloaded and received by him on the 5th day of July, 1913, at the city of Phoenix, and admits that he did not nor did any person else, to plaintiff's knowledge, or on his behalf, make demands or claim in writing within said ten day period, to the freight claim agent of the defendant, or to the defendant or to any agent of the defendant, for the loss or damage sustained by him in said shipment; and

Further replying, plaintiff denies that it was entirely possible or at all possible for him to have given such notice in writing or at all, to the defendant or to its agents within said ten day period, after

the unloading of said cattle, for the reasons hereinafter more fully set forth; and further replying, plaintiff denies that by reason of his failure or the failure of any person for him or on his behalf, to make such claim in writing within ten days after the unloading of said cattle, he waived or released all or any portion of his said claims against the defendant on account of the loss or damage to his said shipment, as set forth in his said complaint.

Further replying, plaintiff alleges that on the 4th day of July, 1913, and at all times subsequent to the arrival of said cattle at the station of Yuma, Arizona, the defendant had full knowledge and notice of the injuries and damage to plaintiff's cattle as set forth in his said complaint; that said cattle were unloaded by the defendant into its stock-pens [59] at the station of Yuma, between the hours of nine and ten o'clock A M on the 4th day of July, 1913, and between said date and the hour of 7:30 P. M. of of said day, and prior to the reloading of said cattle into the defendant's cars, five of said cows died; that said cattle remained in the defendant's stock-pens at Yuma from about the hour of 10:30 A. M. of said 4th day of July, 1913, to 7:30 P. M. of said day, without any shelter or protection whatsoever from the intense heat of the sun, and were nursed and cared for during said entire period by the defendant's agents, assisted by one James Ford; that upon loading said cattle it became necessary to provide, and the defendant did provide, an additional car in which to ship thirteen of the sick and crippled cat-

tle of the plaintiff to their destination at Phoenix; that at various points between the said station of Yuma and the city of Phoenix, the train officials in charge of said shipment, received telegraphic inquiries from other officials of the defendant, inquiring as to the condition and welfare of said shipment; that upon the arrival of said shipment at Phoenix, Arizona, one of said crippled animals remained in defendant's car for a period of more than a week, and that immediately after the unloading of said shipment at Phoenix, Arizona, and almost daily from said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizona Eastern Railroad Company and of this defendant, were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the one hundred and forty-seven (747) head of plaintiff's cows which arrived at the destination alive, were such as to render it impossible for this plaintiff or any person else in the exercise of due care and diligence, to determine the amount and extent of damage sustained by the plaintiff, within said ten-day period; [60] that a number of said cattle died many days after their arrival at Phoenix, Arizona, as the result of said injuries.

That on or about the 21st day of October, 1913, and after repeated efforts to arrive at any determination with the defendant and its delivering carrier, as to the extent and amount of damages sustained by the plaintiff, the plaintiff made demand in writing upon the defendant for the sum of Fif-

teen Hundred and Seventy Dollars ($1,570) in satisfaction of the damages accrued to him at that time by reason of the acts of negligence set forth in his complaint, which said demand was refused. That thereafter and on, to wit, the 15th day of December, 1913, and as soon as plaintiff was able to ascertain the nature and extent of the injury and damage to his cattle as set forth in his complaint, he again made written demand upon the defendant for the sum of Twenty-six Hundred and Ninety-five Dollars ($2,695) in full satisfaction of the damage and injuries sustained by him in the manner set forth in his said complaint, which demand was refused.

Further replying, plaintiff alleges that defendant has repeatedly waived the requirements on the part of plaintiff that he make said demand in writing within said ten day period, in this, to wit, that defendant has on many occasions prior to the 21st day of October, 1913, recognized plaintiff's right to a recovery in some amount on account of his damages sustained as set forth in his said complaint, and has on many occasions attempted to settle and compromise said claim with the plaintiff; that subsequent to the giving of the notice in writing on the 21st day of October, 1913, and the 15th day of December, 1913, as above set forth, defendant has attempted on two different occasions through its claim agents, to adjust with plaintiff the loss and damage sustained by him as set forth in his said complaint. [61]

III.

For his reply to paragraph number IV, of defend-

ant's second amended answer, plaintiff denies that said contracts or any of them were fairly made or entered into between the plaintiff and his duly authorized agents and the defendant, and denies that the plaintiff or his duly authorized agents or either of them, stipulated that the agreed valuation of said livestock was the sum of Thirty Dollars ($30) per head, and denies that said valuation as was named in said shipping contracts was so placed and named by the plaintiff or by either of his agents for the purpose of securing lower freight rates or at all; and alleges that at the time of signing said contracts, neither the plaintiff nor his agents had any knowledge or information as to the value placed or to be placed upon said shipment, in said contracts, and further alleges that at the time of the signing of said contracts, no writing of any kind or nature whatsoever, was embodied therein; that the agent of the defendant as San Luis Obispo, California, placed before *his* plaintiff and his agents, the said printed forms of contract in blank, and requested the plaintiff and his agents to sign the same, and that he, the said agent, would, at his leisure, fill in said contracts and deliver them to the conductor in charge of said shipment, for delivery by him to the plaintiff and his agents. That neither the plaintiff nor any of his agents saw said contracts or any of them until they were delivered to them by a freight conductor in charge of said shipment on the second freight division of defendant's line out of San Luis Obispo, California, and that not until such time did the plaintiff or his agents have any knowledge as to the

valuation named in said contracts, or as to the terms and conditions thereof. That said valuations were arbitrarily named [62] and placed in said contracts by the agent of the defendant, without the knowledge or assent of the plaintiff or of any of his agents to said valuation, and that neither the rate to be charged upon said shipment nor the valuation to be placed upon said cattle, was mentioned or discussed by the plaintiff or his agents with the agent of the defendant; that this plaintiff is not advised of the purpose or motive of the agent of the defendant, in placing a valuation of $30 per head on said shipment, and that had the plaintiff been permitted to insert the valuation of his said cattle in said shipping contracts, or had the valuation of his said cattle been asked by the agent of the defendant, he would have stated to said agent the true value thereof, and would not have assented to the valuation named, therein by said agent. That the defendant should not be permitted under the conditions above set forth, to limit the amount of plaintiff's recovery herein by said valuations arbitrarily made and placed in said contracts without the knowledge and assent of the plaintiff or his agents as above set forth.

IV.

Replying to the allegations set forth in paragraph numbered V, of defendant's second amended answer, plaintiff denies that his said cows were in poor, weak and starved condition at the time and place of their delivery to the defendant for shipment, but in that

behalf alleges that said cows and all of them were well-fed dairy cows in good flesh, and in every respect in robust and healthy condition; and further denies that by reason of the climatic conditions under which said cattle were raised, they were in anywise unfitted for transportation over the line of the defendant to Phoenix, Arizona. [63]

V.

Replying to paragraph number VI, of defendant's second amended answer, plaintiff admits that he has not paid the freight charges upon said shipment, and that he has not paid for the feed provided for said cattle while en route to Phoenix, for the reasons:

1st. That he has been unable to agree with the defendant or its delivering carrier, as to the amount of freight that should be paid upon said shipment under the conditions set forth in plaintiff's complaint; and

2d. For the further reason that he has been unable to adjust with the defendant or its delivering carrier, the losses sustained by him as set forth in his said complaint; and in that behalf further alleges that on the arrival of said cattle at Phoenix, Arizona, the said cattle were voluntarily delivered to plaintiff by the Arizona Eastern Railroad Company, and that any lien held by the defendant or the said Arizona Eastern Railroad Company on said cattle for said freight and feeding charges, was thereby expressly released by the voluntary act of said company; that plaintiff has at all times been and is now, ready, able and willing to pay the freight charges upon said shipment when the same is fairly and

properly measured and adjusted with this plaintiff.

WHEREFORE, plaintiff prays that the defendant take nothing by reason of its second amended answer herein.

HAYES & LANEY,
Attorneys for Plaintiff.

[Endorsements]: No. 142. In the United States District Court, for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Reply to Defendant's Second Amended Pleas and Answer. Reced. Copy. J. C. Forest, Attorney for Defendant. Filed Oct. 12, 1915, at — M. George W. Lewis, Clerk. By R E. L. Webb, Deputy. **[64]**

[Order Sustaining Demurrer to Defendant's Pleas Involved, etc.].

In the United States District Court for the District of Arizona.

Minute Entry Appearing Under Date of October 12th, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PAC. CO.,

Defendant.

The demurrers of the plaintiff to the defendant's pleas in bar as set out in its second amended pleas

and answer on file herein are this day argued by counsel, P. H. Hayes, Esquire, appearing on behalf of the plaintiff and J. C. Forest appearing on behalf of the defendant; and, upon consideration thereof by the Court,

IT IS ORDERED that the said demurrers be and the same are hereby sustained, to which ruling of the Court, the defendant by counsel excepts and asks that his exception be noted upon the record and the same is accordingly done by the clerk. [65]

[Minutes of Trial—October 26, 1915.]

In the United States District Court for the District of Arizona.

Minute Entry Appearing Under Date of October 26th, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

Trial of this cause came on regularly to-day, the plaintiff in person and with P. H. Hayes, Esquire, his counsel, and Francis M. Hartman, Esquire, and J. C. Forest, Esquire, counsel for the defendant, appearing in open court, and both sides announce themselves ready for trial. Thereupon D. H. Little is ordered appointed and sworn in as court reporter

in this case and he is accordingly duly sworn to act as court reporter in this case in open court. The Court, thereupon orders the clerk to call into the jury-box 18 jurors and their names are called and all answering thereto, respectively, take their places in the jury-box. Said jurors are thereupon duly sworn on their *voir dire.* Whereupon J. H. Allen is challenged by the plaintiff for cause and such challenge allowed by the Court and C. D. Young is called in his stead and duly sworn on his *voir dire.* Whereupon said C. D. Young is challenged for cause by the defendant and such challenge is allowed by the Court and Daniel J. Brislin is called in his stead and duly sworn on his *voir dire* and all are found to be duly qualified and accepted. Thereupon, each side strikes three names from the list and the remaining 12 on the said list, as follows: Oscar Moore, H. L. Pattee, Walter A. Moser, B. A. Neighbors, C. G. Cappel, Frank Cooper, James B. Marrs, W. D. Reading, James W. Ladd, W. T **[66]** Tweedy, W, D, Foreman, and Daniel J. Brislin, are selected by the clerk and are duly sworn to well and truly try the issue joined between the plaintiff and defendant herein.

Thereupon, the plaintiff by P. H. Hayes, Esquire, his attorney, reads his complaint and makes his opening statement, and Francis H. Hartman, Esquire, counsel for the defendant reads defendant's answer.

The plaintiff, then, to maintain upon his part the issue herein, calls Frank R. Stewart and James Ford as witnesses upon behalf of the plaintiff and they

are duly sworn, examined and cross-examined.

The hour of adjournment having arrived, and the trial of the case not being completed, the Court admonishes the jury and orders the further trial hereof adjourned and continued until Wednesday, October 27, 1915, at 9:30 o'clock A. M. [67]

[Minutes of Trial—October 27, 1915.]

In the United States District Court for the District of Arizona.

Minute Entry Appearing Under Date of October 27th, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Trial of this case is to-day resumed pursuant to an order of continuance made on yesterday, plaintiff in person, counsel for both sides and all jurors being present in court.

Chas. A. Whitfield, and C. E. Connor are called as witnesses upon behalf of the plaintiff and are sworn, examined and cross-examined. James Ford is recalled as a witness on behalf of the plaintiff for further cross-examination and is cross-examined. Frank E. Whitton and R. H. Fields are called as witnesses upon behalf of the plaintiff and are duly

sworn, examined and cross-examined. Frank R. Stewart is recalled as a witness for the plaintiff for further examination, and is examined and cross-examined. James Ford is recalled as a witness for the plaintiff for further examination and is examined and cross-examined. Frank E. Whitton and R. H. Fields are recalled as witnesses for the plaintiff for further examination and are examined and cross-examined. A. N. Gurley is called as a witness for the plaintiff and is duly sworn, examined and cross-examined. Thereupon the plaintiff rests his case.

The defense, then, to maintain upon its part the issue joined, offers Defendant's Exhibits 4, 5, 2 and 6 in evidence, and they are admitted and filed. Thereupon, William Wilson, Morris W. Howard, O. M. Shreve, A. R. Gatter and William H. [68] Francis are called as witnesses upon behalf of the defendant and are duly sworn, examined and cross-examined.

The hour of adjournment having arrived and the trial of the case not being complete, the Court admonishes the jury and orders the further trial hereof adjourned and continued until Thursday, the 28th day of October, A. D. 1915, at 9:30 o'clock A. M. [69]

[Minutes of Trial—October 28, 1915.]

In the United States District Court for the District of Arizona.

Minute Entry Appearing Under Date of October 28, 1915.

No. 142.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC CO.,

Defendant.

Trial of this case is this day resumed, pursuant to an order of continuance made on yesterday, the plaintiff in person, counsel for both sides and all jurors being present in open court.

C. S. Norman, Garfield Christianson, J. J. Casey and Charles Davis are called as witnesses upon behalf of the defendant, and are duly sworn, examined and cross-examined. The depositions of Frank Witcosky, Ed Peterson, Millard Peterson, F. D. Martin, and M. E. McKirahan were read in evidence. Thereupon the defendant rests its case

C. S. Norman is recalled as a witness in rebuttal for the plaintiff and is examined. Frank R. Stewart, Frank E. Whitton and James Ford are recalled as witnesses in rebuttal on behalf of the plaintiff and are examined and cross-examined. Vernon Ford is called as a witness in rebuttal for the plaintiff and is

duly sworn, examined and cross-examined. Thereupon the plaintiff rests his case.

Thereupon, the defendant moves the Court for a directed verdict for the defendant on the grounds set out in the reporter's transcript of the testimony and said motion is resisted by the plaintiff and is argued by counsel and, thereupon, IT IS ORDERED by the Court that said motion be and the same is hereby denied, [70] to which ruling and action of the Court the defendant by counsel excepts.

The hour of adjournment having arrived, and the trial of the case not being complete, the Court admonishes the jury and orders that the further trial hereof be adjourned and continued until Friday, October 29, 1915, at 9:30 o'clock A. M. [71]

In the United States District Court for the District of Arizona.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Motion by Defendant for Directed Verdict.

Now comes the above-named defendant, Southern Pacific Company, and moves the Court for a directed verdict in its favor, and, in case said motion shall be

denied, that it have leave to go to the jury.

FRANCIS M. HARTMAN,
Tuscon, Arizona,

J. C. FOREST,
Phoenix, Arizona,
Attorneys for Defendant.

[Endorsements]: No. 142 (Phx.). In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Defendant's Motion for Directed Verdict. Filed Oct. 28, 1915. George W. Lewis, Clerk. [72]

[Minutes of Trial—October 29, 1915.]

In the United States District Court for the District of Arizona.

Minute Entry Appearing Under Date of October 29th, 1915.

No. 142.

FRANK R. STEWART,
Plaintiff,

vs.

SOUTHERN PACIFIC CO.,
Defendant.

Trial of this case is this day resumed pursuant to an order of continuance made on yesterday, the plaintiff in person, counsel for both sides, and all jurors being present in open court.

There being no further testimony offered, and the

evidence being closed, argument of counsel is had; the Court instructs the jury orally, the delivery of written instructions having been expressly waived in open court, the plaintiff excepting to that part of the Court's instructions to the jury as shown in the reporter's transcript of the testimony for the reasons contained in that transcript, and the defendant excepting to the portions of the instructions of the Court as shown in the reporter's transcript of the testimony for the reasons therein set out, and the plaintiff also excepting to the ruling of the Court in giving all the instructions asked for by the defendant and given by the Court, and for refusing to give all the instructions asked for by the plaintiff; and the defendant excepting to the ruling of the Court in giving all the instructions asked for by the plaintiff and given by the Court and for the Court's action in refusing to give all the instructions asked for by the defendant; and thereupon the jury retire to their room in charge of A. J. Stark and F. A. Weage, their bailiffs, first duly sworn for such purpose, to consider of their [73] verdict. After a time said jury return into court in charge of their bailiffs and, upon being asked if they have agreed upon a verdict, through their foreman, state that they have agreed. Whereupon, said jury, through their foreman, present their verdict, as follows, to wit:

"FRANK R. STEWART,

Plaintiff,

Against

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Verdict.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and we do assess his damages at the sum of ($2,090) Two Thousand Ninety and no/100 Dollars.

W. D. READING,
Foreman."

And the clerk inquiring of said jury if such is their verdict, they state that it is and so say they all. Thereupon, said jury is ordered discharged from the case; AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that judgment be entered in favor of the said plaintiff and against said defendant in the sum of Two Thousand Ninety and no/100 ($2,090) Dollars, in accordance with the verdict of the jury.

[Order Extending Time to Prepare and File Bill of Exceptions.]

No. 142.

FRANK R. STEWART,
Plaintiff,

vs.

SOUTHERN PACIFIC CO.,
Defendant.

Upon stipulation of counsel for both sides herein, IT IS ORDERED that the defendant be given sixty days from this date within which to prepare and file

its bill of exceptions herein and that stay of execution be granted to the defendant for the same period of time. [74]

FRANK R. STEWART,

Plaintiff,

Against

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Verdict.

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff, and we do assess his damages at the sum of ($2,090), Two Thousand Ninety and no/100 Dollars.

W. D. READING,

Foreman.

[Endorsements]: No. 142. United States District Court, District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Verdict. Filed Oct. 29, 1915. George W. Lewis, Clerk. By ————, Deputy Clerk. [75]

In the United States District Court for the District of Arizona.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Judgment.

This cause came on regularly to be heard the 26th day of October, 1915, before the Court sitting with a jury, the plaintiff appearing with his counsel, Messrs. Hayes & Laney, and the defendant appearing by its counsel, Messrs. Francis M. Hartman and J. C. Forest.

Witnesses were duly sworn and examined on behalf of the plaintiff and defendant, and both oral and documentary evidence introduced on behalf of plaintiff and defendant; and after arguments by counsel for plaintiff and defendant, and instructions by the Court, the jury retired in charge of bailiffs to consider of their verdict. In due time the jury returned into the courtroom with their verdict, which said verdict was duly recorded, and was in words, letters and figures as follows, to wit:

"FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury, duly impaneled and sworn in the above-entitled action, upon our oaths do find for the plaintiff, and we do assess his damages at the sum of ($2,090), Two Thousand and Ninety and no/100 Dollars.

W. D. READING,
Foreman." [76]

WHEREFORE, it is ORDERED AND ADJUDGED that the plaintiff do have and recover of and from the defendant, the sum of Two Thousand and Ninety Dollars ($2,090), together with his costs herein incurred, taxed and allowed, in the sum of Ninety-three and 60/100 Dollars ($93.60), together with interest on each of said sums, at the rate of six per cent (6%) per annum from date hereof until paid.

[Endorsements]: In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Judgment. Recd. Copy this 30th day of October, 1915. J. C. Forest, Attorney for Defendant. Filed Oct. 30, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [77]

In the United States District Court for the District of Arizona.

No 142—PHOENIX.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that on the twenty-sixth day of October, 1915, the above-entitled cause came on for trial before the above-entitled court and

a jury duly empaneled, Honorable William H. Sawtelle, presiding, plaintiff appearing by P. H. Hayes, his counsel, and the defendant appearing by Francis M. Hartman, and J. C. Forest, its counsel, and the following proceedings were had:

[Testimony of Frank R. Stewart, for Plaintiff.]

FRANK R. STEWART, the plaintiff, called as a witness in his own behalf, and being first duly sworn, testified in substance as follows:

Direct Examination.

By Mr. HAYES.—My name is Frank R. Stewart. I reside in Phoenix. Resided there between July 1st and 5th, 1913, at which time I shipped 152 head of cattle over the Southern Pacific Company's lines from San Luis Obispo to Phoenix. We loaded the cattle on July 1st, at San Luis Obispo, in the afternoon. Commenced loading around three o'clock. Finished about half-past five. They were dairy cows and were loaded into five cars. We got out of San Luis Obispo that night about ten o'clock. We unloaded at Los Angeles the next day, I think about noon. I accompanied the shipment from San Luis Obispo to Los Angeles, and as far as Yuma. Mr. Frank Whitten and Mr. James Ford also accompanied the [78*—1†] shipment. The cattle were in good condition when unloaded at Los Angeles. They remained in the pens there until the next afternoon, about 4:40 Pacific time, when we began loading. The cattle were fed and watered

*Page-number appearing at foot of page of original certified Record.
†Original page-number of Bill of Exceptions as same appears in Original Certified Transcript of Record.

(Testimony of Frank R. Stewart.)

well in the corrals in Los Angeles. I helped to load them. Before arriving at Yuma I received a telegram from Mr. Field, at Phoenix, who was my partner in the real estate business. I turned the telegram over to the agent of the Southern Pacific Company at Yuma. We arrived at Yuma about nine o'clock on the morning of the 4th of July, 1913, Pacific time. I went up to the office and the agent asked me, "Are you going to unload?" and I said, "No, I am going through." And he said, "Well, I will have to see about that." In a few minutes he said to me, "You will have to unload." I said, "I am not going to unload these cattle here; if you unload them, you will kill every head of cattle I have got. The cattle are cool. They are still in good shape. I don't propose to unload the cattle here in these sand pens." There is no shade there whatever. The stock-pens at Yuma were sand dunes with a fence around them, where the cattle had been trampling manure into the sand for years. It was hot as an oven. There was no shade at all. No trees. I said to the agent, "If you unload the cattle you unload them at your own risk," and he took the cattle out of my hands and unloaded them, and I left and went up town. Possibly an hour was consumed in our conference and argument with the agent with respect to unloading. Neither myself nor my men had anything to do with the unloading. I did not go back to the stockyards where the cattle were until along about five o'clock,

(Testimony of Frank R. Stewart.)

and found that five of the cattle had died, and the others were in pretty bad shape. They seemed to be stiffened up. The cattle were reloaded at Yuma at about half-past seven into six cars We loaded the first five cars, and we had thirteen cripples in a **[79—2]** separate pen that the railroad company furnished an extra car to load them into. The cattle, when they left San Luis Obispo were in very good flesh. Some of them were quite fat. The cows that died at Yuma were the fattest ones. They were overcome with the heat. The shipment arrived at Phoenix on the fifth of July, about one o'clock in the afternoon. The cattle when they arrived at Phoenix were in a badly stove-up condition from the effects of the heat. I had trouble getting them out to the pasture. Several of them staggered all the way up the road. We left one of the animals in the car. We could not get her out. The majority of the cows were milking at the time we shipped them. We milked them at Los Angeles. The shipment of the cows stopped the flow of milk on some, and some of them did not give more than half what they were giving. There were five others died here after arrival. All told, twenty-five died. I had had experience prior to that time in the purchase and sale of dairy cows in the Salt River Valley, Arizona, of the grade and physical condition of these cows at the time they were loaded at San Luis Obispo. The reasonable market value of dairy cows of such grade and in such physical condition as these cows were prior to their injuries, in the Salt River

(Testimony of Frank R. Stewart.)

Valley, was eighty-five to ninety-five dollars, and some had been selling at a hundred dollars. These cows were worth eighty-five to ninety dollars a head in Phoenix. I sold forty-five head of them—agreed to sell them to a man by the name of Segrist at eighty-five dollars a head. I afterwards took the cattle back. Seventeen of them died. I sold eighty-seven head of these cattle for sixty-five dollars a head. These eighty-five head were worth in their normal condition, eighty-five dollars a head. I have sold nine animals to a man named Ross for eighty-five dollars a head. **[80—3]** Within three or four days after the arrival of the shipment at Phoenix the matter of my claim for damages was taken up with the Arizona Eastern Railroad. The Southern Pacific people did not say anything to me about paying the freight on the cattle, because I told them I would not pay the freight and two or three days afterwards a man from their office came to see me and I told him I would not pay the freight on the cattle until our damages was adjusted and then he came to see me three or four times after that. I first presented a claim in writing to the agent of the Arizona Eastern and the Southern Pacific Company for damage I think on the second of October. At that time I had not ascertained the whole extent of my damage. I lost some of the cattle after that. I think I next made a claim in writing in the early part of December for loss of eleven head at eighty-five dollars a head and damages to eighty-seven head of

(Testimony of Frank R. Stewart.)

twenty dollars a head and twenty dollars that I paid for care of the cattle. Some of the cattle died after December.

Cross-examination.

By Mr. HARTMAN.—I have lived in Arizona for fifteen years and in and around Phoenix for six or seven years. Been in the cattle business the last couple of years. I had shipped cattle into Arizona from San Luis Obispo, California, prior to this shipment. I shipped them in May and June. I went up to San Luis Obispo to get these cattle. San Luis Obispo is near the coast—I guess about fifteen miles. It was not as hot where I bought these cattle, at San Luis Obispo as it was here in Arizona. It was dry there at that time. There was a drouth there at that time. I knew it got pretty warm in and around Phoenix on the fourth of July and I knew that Yuma was lower in altitude than Phoenix. I know that the cattle had to go through the southern [81—4] portion of California. I know that it is warm through there. I knew that it was warm in Yuma. I don't think it was much warmer than here. I have heard that Yuma has the reputation of being a very hot town in the summer-time. I had heard that before I went to San Luis Obispo to bring these cattle into Phoenix. I selected the time for bringing the cattle in. (Witness here shown document marked for identification Defendant's Exhibit No. 4) I have seen this document before. This is my signature on the bottom at the left hand corner. I signed this

(Testimony of Frank R. Stewart.)

paper at San Luis Obispo on or about the first day of July, 1913. Mr. James Ford did not own any of these cattle. He did own some of them. I bought some from him. Thirty head of cattle were shipped in the name of James Ford. He signed one of these papers there at San Luis Obispo, on July first, 1913, while we were loading the cattle. All three of us signed one of these papers, myself, Whitten and Ford. Sixty-two head of cattle were shipped in the name of Frank Whitten. I saw him sign a paper which looked like this one (referring to document marked for identification Defendant's Exhibit No. 5). At the time that the cattle were shipped I knew that they were shipped sixty head in my name, sixty-two head in the name of Mr. Whitten and thirty head in the name of Mr. Ford at my request. I did not keep any record of the time of reloading in Los Angeles. They may have commenced loading at three twenty P. M., I am only testifying about that from my recollection. I went from Los Angeles to Yuma with the cattle. Rode in the caboose. Got to Yuma about nine o'clock in the morning. I know it was nine o'clock because I was figuring on the time I would get to Maricopa that evening. The railroad company treated the cattle the best they could I guess. They watered the cattle. When I went up to the pens at five o'clock there was water in the [82—5] troughs and I saw evidences of where they had been using water pretty genereously—had wet down the dust. I can't say that I ever saw any sheds over

(Testimony of Frank R. Stewart.)

cattle-pens in Arizona. I don't have sheds in my pasture for the cattle to stay under. I have shade trees. I turn the cattle out in the pasture and let them run in the sun. I knew the railroad company did not have any cattle-pens at Maricopa. I boarded a passenger train at Yuma and came on to Phoenix. I came on here and made arrangements to take care of these cattle. I did not pay any fare. When the cattle arrived at Phoenix I drove them away without paying the freight and have not paid the freight yet. I did not surrender the original livestock contract and bill of lading marked for identification as Defendant's Exhibit No. 5 when I took the cattle from the railroad company. I kept that. Some young man down there at the freight house told me to take the cattle.

[Testimony of James Ford, for Plaintiff.]

James Ford, being called as a witness on behalf of the plaintiff and first duly sworn, testified in substance as follows:

Direct Examination.

By Mr. HAYES.—My name is James Ford. I reside at the present time about three miles north of Phoenix. Was residing at Cambria, thirty-five miles from San Luis Obispo, California, in July, 1913. During the latter part of June or the early part of July, 1913, I sold Mr. Stewart fifty-seven head of cows *a* heifers. I was paid for them. They were dairy cows. I have been in the dairy business for the last five years constantly. I have handled cattle

(Testimony of James Ford.)

and stock of all kinds since I was twenty-one years of age—for the last thirty years. I am familiar with dairy cows generally. This bunch of dairy cows I sold to Mr. [83—6] Stewart I consider an average bunch of cows—some of them above the average. Their physical condition was good. They were mixed breed—Holsteins, Jerseys, Durhams and Guernseys. I drove them from my place to San Luis Obispo. None of the cattle gave out or fell by the way side. Everyone was delivered that we started with except one that had her leg fractured. I accompanied the shipment to Phoenix. I was acquainted with the remainder of that shipment of 152 head. Some of the others were a good deal better than what I had. The others compared pretty much the same with mine. They were an average bunch of dairy cattle. I helped to unload and load the cattle at Los Angeles. Their condition was good. They were well fed and had all the water they wanted at Los Angeles. They were in fine condition when they were loaded on the cars at Los Angeles. The cattle stood the trip fine up to that time. We arrived with the shipment of cattle at Yuma about nine o'clock Pacific time. The reason I remember I saw two large clocks in the office, side by side, and one of them was nine o'clock and the other was ten o'clock. I saw Mr. Stewart have a telegram at Yuma. He gave it to one of the operators there—one of the agents. When the cattle arrived at Yuma they were in good condition as far as I could see. They were all stand-

(Testimony of James Ford.)

ing quiet and nice and perfectly cool. I went to the office with Mr. Stewart and Mr. Whitten. I know Mr. Stewart was talking very hard to keep the cattle from being unloaded, and wanted to ship them on through and wanted to sign a release for doing anything, and they argued and argued for a long time and we all three argued with them that if they unloaded the cattle there they would die from the heat. All I know is that I heard transpire between Mr. Stewart and the operator. The operator stated he would have to unload the cattle. He [84—7] had wired to Tucson. Mr. Stewart did not unload the cattle, the railroad company and the people there unloaded them. I saw the cattle-pens of the Southern Pacific Company at Yuma into which the cattle were unloaded. They were just bare corrals, right out in the open, no sheds, no shade trees or shade of any kind. The bottom of the corrals were dusty, sand and dust. I did not see the cattle unloaded. We all went over to the hotel and had our breakfast or dinner— the first we had had to eat that morning, and about an hour after that I went up to the corrals. One of the men from the office came over to the hotel and asked for Mr. Stewart. He said the cattle was getting in bad shape. I said, "Well, we had better go down there and see what can be done for them," and when we got down there they were all pretty near dead and would have all died in a few minutes if we had not got water to them. They were overcome with the heat. They were standing about half way around

(Testimony of James Ford.)

over the water as close as they could get. Some of them were dead and some almost ready to drop and some did drop dead while I was in the corral. I told this gentleman, whoever he was, that the best thing I could see was to get water to these cattle as soon as he could and spray them, and I got buckets and wherever there was a bunch of cattle I threw water over them, and when he saw the cattle recover from the effects of the water he ordered the men in the yard there, the section hands with buckets until we had the cattle in a nice condition. That is they were cooled off and they were not suffering any more with the heat. I am accustomed to handling cattle. Pouring water on them when they were so hot would stiffen them and cripple them in a way. I observed them after that, and I remember they were pretty badly crippled. They were all fat cows, every one of them. The fattest of the cows in the bunch [85—8] died. They naturally would. The heat will kill a fat animal quicker than it will a thin one. I assisted in loading the cattle back into the cars that night—six cars. The railroad company gave us an extra car to put the cripples in—about fifteen or sixteen head. If the cattle had not had water there I think they would have all died without a doubt. There were several corrals there—four or five, and they had bunched them off in separate corrals, about a carload in a corral. We were notified about the cattle after we had had our lunch. We had lunch a few minutes after we got in. I judge it must have been along about one or two o'clock when we were notified

(Testimony of James Ford.)

about the cattle. I accompanied the shipment to Phoenix. Overheating will cause a cow to stop giving milk. I saw the cattle after they were unloaded at Phoenix. Some of them were pretty badly used up. I live in the Salt River Valley, near Phoenix, now. The feeding conditions in the vicinity of San Luis Obispo at the time these cattle were shipped—in some places the feed was pretty short. In other places they had plenty of feed. At the time I sold these cattle I was feeding them hay and letting them run on the pasture, only we had to buy alfalfa meal and crushed barley. I can't say that any of these cattle were poor. Some of them were a little thin. I would not say that any of these cattle were too poor to withstand shipping. They did stand it.

Cross-examination.

By Mr. HARTMAN.—San Luis Obispo is a good climate and the fog comes in sometimes from the ocean—quite often in the summer-time. The climate in San Luis Obispo in the summer-time is much cooler than the climate here around Phoenix, Arizona. I have been here around Phoenix about two years. It had been a pretty dry [85½—9] year around San Luis Obispo, at the time these cattle were shipped. They had a drouth. I came along with the cattle from Phoenix to San Luis Obispo to help take care of them. I did not write down the time that we arrived at Yuma. When we got into Yuma we went right over and got our dinner at the club, Mr. Stewart and Mr. Whitten and myself, and I stayed there until I

(Testimony of James Ford.)

went back to the corral. Neither one of us stayed with the cattle. We did not help to unload the cattle. The most of the country we had come through was a desert. The cattle had been in the cars quite a long time without any water, and without feed or rest, from about four-thirty P. M. the day before, I guess, until nine o'clock on the morning of July fourth. I don't suppose water would have hurt the cattle any. After we got in we went to the club house there, to get our breakfast. The cattle had water when they arrived at Yuma. I suppose if we had poured water on them immediately upon unloading at Yuma and kept pouring water on them, undoubtedly we would have kept them from getting hot and that would have saved them. If we had stayed there and poured water on them, it would have kept them from getting overheated. Mr. Stewart did not help unload the cattle. He did not help take care of the cattle at Yuma, as I know of. After Mr. Stewart left the office he went over to the hotel and we ate our breakfast or dinner. I went with him. The three of us went. When I went back to the corrals about one o'clock Mr. Stewart was not helping take care of the cattle. I saw him later in the evening. He refused to have anything to do with them. He refused to go down there and help take care of the cattle. I did not help take care of them until the cattle were dying from the heat, and then I did. I think if it was not for me the cattle would have all died. When I got down there they got the hose [86—10] and turned the water on and they got the

(Testimony of James Ford.)

hose, because I told them that water would help them. I did not attend to taking care of the cattle; I went off up town. I went over to the hotel and stayed there.

(Adjournment taken until October 27, 1915.)

October 27, 1915.

[Testimony of C. A. Whitfield, for Plaintiff.]

C. A. WHITFIELD, called as a witness on behalf of the plaintiff, and first duly sworn, testified in substance, as follows:

Direct Examination.

By Mr. HAYES.—My name is C. A. Whitfield. Reside in Phoenix, Arizona. Resided here nine years. Am in the cattle business at the present time. Was so engaged in July, 1913—buying and selling cattle—shipping them in here and selling—handled dairy cattle. Am acquainted with the market value in the Salt River Valley, at Phoenix, Arizona, during the month of July, 1913. I saw a shipment of 147 cattle which arrived in Phoenix on July 5, 1913, consigned to Mr. Stewart. I would say that the cattle were worth from eighty-five to ninety dollars.

Cross-examination.

By Mr. HARTMAN.—I saw the cattle in the stockyards, to the best of my recollection, on July 5th, when they were shipped in here. It was right after the fourth of July, I know. I didn't take any memorandum of it at the time. They were in the pens in the yards.

[Testimony of C. E. Connor, for Plaintiff.]

C. E. CONNOR, being called as a witness on behalf of the plaintiff and first duly sworn, testified in substance, as follows:

Direct Examination. [87—11]

By Mr. HAYES.—My name is C. E. Connor. Reside about three miles north of Phoenix. Resided in Salt River Valley, Arizona, about twelve years—buying and selling dairy cattle. I was acquainted with the market value of dairy cows in the Salt River Valley during the month of July, 1913. I did not see this shipment of cattle at the time it was delivered in Phoenix. I did not see them until after they were sold, when I saw a portion of them, the cattle which Mr. Segrist bought from Mr. Stewart. I would say the market value in their normal condition would be an average of about ninety dollars.

Examination by the Court.

The opinion that I had of these cattle at the time was based on the valuation in my own estimate, comparing them with cattle that I had sold him myself. Considering the fact that I knew nothing of any of them being overheated or abused in shipment, they would have been worth ninety dollars a head at that time, assuming that they had received no injury. I did not see these cattle until some time about the fore part of August or possibly the latter part of July. They were in very poor condition and without any knowledge that they had been injured in any

way, I would say that they were worth ninety dollars apiece.

[Testimony of James Ford, for Plaintiff (Recalled).]

JAMES FORD, recalled as a witness on behalf of plaintiff, testified in substance as follows:

Cross-examination (Continued).

By Mr. HARTMAN.—(Document marked for identification "Defendant's Exhibit No. 2" handed to witness.) I signed this paper. That is my signature. I suppose I had the original of this paper in my possession. I must have had it. I can't produce it now. [88—12] I never have paid any more attention to it after we landed. I put it in my pocket and went back to California. I was only here four days and went back to California, and, of course, I don't know what became of the papers. I was along with these cattle when they were being transported from San Luis Obispo to Phoenix. One carload of cattle was shipped in my name. I had to ship one carload in my name in order to come with the cattle. That is the reason the one car was shipped in my name, so I could ride free along with the cattle. I did not pay any fare from San Luis Obispo to Phoenix. I came along with the cattle to load and take care of them. I have been handling dairy cattle a good many years—fifteen or twenty years. When we arrived at Los Angeles we saw that the cattle were fed and taken care of, and I attended to that or helped to attend to it. I was right there helping to take care of the cattle. Mr. Stewart was there part of the time also. Mr. Whitten was there also. We

(Testimony of James Ford.)

were all three there. We hired milker to milk the cows in Los Angeles. I think we milked the cows twice in Los Angeles. We milk dairy cows twice a day when they are not on the road. They ought to be milked twice a day if possible. If they are not milked twice a day, it injures them somewhat. If cows go thirty-six hours without milking, it affects the cattle for the time being—is injurious to them. It is a fact that if the climate at the town of Yuma had been the same, or practically the same as the climate at San Luis Obispo, or where the cattle came from, the cattle would not have been injured at all by unloading at Yuma.

[Testimony of Frank H. Whitten, for Plaintiff.]

FRANK H. WHITTEN, being called as a witness on behalf of the plaintiff, and first duly sworn, was examined and testified in substance, as follows:

Direct Examination. **[89—13]**

By Mr. HAYES.—My name is Frank H. Whitten. I reside three miles north of Phoenix. Have resided in the Salt River Valley, Arizona, twenty-two years. Engaged in livestock and real estate business. I accompanied Mr. Stewart to California during the latter part of June, 1913. I went with Mr. Stewart to pass upon some milk cows for him and assist him in the purchase of some milk cows in California, about 150 head, I think. I saw all of the cattle purchased by Mr. Stewart. I am acquainted with that shipment. I accompanied the shipment from San

(Testimony of Frank H. Whitten.)

Luis Obispo to Phoenix, Arizona. At the time they were shipped they were in perfect health. Some of them were fat and some just good living condition. They were all in good, healthy, thrifty condition. I have had experience in shipping cattle and handling shipments of cattle. I would not say that there were any of these cattle that were not in suitable flesh and condition generally to withstand shipment. We shipped them in five cars. One of the shipping contracts was in my name. The cattle were unloaded and fed at Los Angeles and milked twice. Had plenty of water. The cattle were in first-class condition when they were unloaded at Los Angeles. They were in first-class condition when reloaded there. It was in the neighborhood of nine o'clock—some time in the forenoon of July fourth—when we arrived at Yuma. I would not be able to state the hour just exactly. I am figuring on the time that we got to lunch. Before that we were, perhaps, arguing around the office an hour or an hour and a half, and then we went over and had dinner, and I know I was eating about a quarter after eleven. I observed the condition of the cattle upon arrival at Yuma. We looked the cattle over when we got to Yuma, and we all remarked that cattle never shipped finer. They were in fine shape. I went [90—14] to the freight office with Mr. Stewart. We had quite an argument there for a little while. We thought we were going right through, and Mr. Stewart said, "What time do we get out of here with these cattle?"

(Testimony of Frank H. Whitten.)

And the agent said, "You don't get away to-day." And he says, "I am going out of here with these cattle this morning; I am going on to Maricopa." And he says, "You are going to unload these cattle here." And Mr. Stewart says, "We are not going to unload these cattle." And I says, "We don't want to unload the cattle at Yuma, to-day." The agent says, "I have orders; I have been ordered by the dispatcher in Tucson to unload these cattle in Yuma." I says, "These cattle will all die to unload them in that hot sun at this time of day." He says, "I can't help it, I have got orders from the dispatcher to unload them." "Well," I says, "we will do anything to release you of responsibility. Wire this man, if you can, and see if he won't let us go on through." He says, "What shall I tell him?" I says, "Tell him we will do anything but unload in Yuma at this time of day." He went off, and I supposed he wired. He stayed about twenty or thirty minutes, and he came back and says, "The dispatcher says to unload these cattle here." And Mr. Stewart says, "We don't unload here. If you unload them, you unload them at your own peril," and then he up and says, "We will have to unload them." The agent took some of the force from the office, and goes and unloads the cattle himself, and we left him. Mr. Stewart had received a telegram from some source prior to his arrival at Yuma. He handed the telegram to the agent at Yuma. The corrals of the Southern Pacific Company at Yuma at that time were per-

(Testimony of Frank H. Whitten.)

fectly good. There was white sand about half knee deep in them. There was no shade. There is no shade in any stockyards. They had water. There was no shade trees in the corrals or vicinity, and no sheds of any **[91—15]** sort. The cars in which the cattle were being transported had roofs on them and they were ventilated sides. I next saw the cattle after unloading at Yuma about five o'clock in the evening. I noticed there were five dead ones and the others had their tongues out and their mouths open. Some of them were stiff trying to walk around the corral. The cattle had all been wet. There was a lot of men with buckets there, and they went and got the fire department, they told me, and turned the hose on the cattle. The cattle that died were fat cows—the ones that suffered the most, and the fat ones suffered more than the thin ones. I think the cattle were reloaded about seven o'clock in the evening—completed about nine o'clock. They were loaded into six cars. I think there were thirteen that we could not get in the other cars and we had to take and tail them to get them in, and the agent gave us another car and we put these thirteen in another car. I know what I am talking about. I was right there. On the way from Yuma to Phoenix I think the conductor came to me as many as two times and said he had communications from the main office in Tucson in regard to these cattle—how they were getting on and all about them. I think we arrived at Phoenix about noon on the next day. They came through fairly good from Yuma to Maricopa.

(Testimony of Frank H. Whitten.)

I observed the cattle after they were unloaded at Phoenix. They were stiffened—quite a lot of them and about all in. I believe there were two or three left along the road. They were in bad shape. One of the cattle remained in the cars. She was taken out on a wagon and hauled out. That animal finally died. I have had experience in buying and selling dairy cows in the Salt River Valley. I know what was the market value of dairy cows in the Salt River Valley in the summer of 1913. The market value of dairy cows of the grade [92—16] and quality of this shipment, when in their normal, healthy condition, would run from eighty-five to one hundred dollars. They were a good average or a little better.

Cross-examination.

By Mr. HARTMAN.—Two cars of these cattle were shipped in my name, so I could go along to help take care of them. That is what I accompanied the cattle for, to help take care of them. Mr. Stewart, Mr. Ford and myself were all care-takers on this shipment of five cars of cows. When we arrived at Los Angeles, Mr. Stewart, Mr. Ford and myself attended to the unloading of the cattle and cared for them after that, watered them, had them milked and reloaded them. We were on the road from Los Angeles to Yuma approximately sixteen hours, I should judge, maybe a little more or less. In going from Los Angeles to Yuma you pass through some orange groves and lemon groves, then over the mountains into pasture lands and then over another mountain

(Testimony of Frank H. Whitten.)

range into a sandy desert. I suppose seventy-five miles of it is sand dunes before you get to Yuma. It seems a long ways. Part of it is dry, absolutely desert country. It is pretty warm, hot and dusty, and when we got to Yuma it was hot. San Luis Obispo, from where the cattle came, is about ten or twelve miles from the coast, I should judge. It is quite a bit hotter in Yuma than in Los Angeles where the cattle were fed and watered. When we arrived at Yuma, neither myself, Mr. Ford or Mr. Stewart helped or assisted in unloading the cattle and we did not assist in taking care of the cattle while at Yuma. After the cattle were loaded into the cars again at Yuma, we climbed on to the train along with them and came to Phoenix. We did not pay anything for our fare from San Luis Obispo to Phoenix. We went along with the cattle as [93—17] care-takers. When we arrived at Yuma, Mr. Stewart, Mr. Ford and myself went off up town. After we had this talk with the agent the three of us went off up town and took a bath and had something to eat. We did not attend to the cattle.

Redirect Examination.

By Mr. HAYES.—The Southern Pacific Company will not ship cattle unless some one accompanies the shipment. I have shipped cattle over the Southern Pacific road from Los Angeles to Phoenix without unloading. You can ship from Los Angeles to Phoenix without unloading, but you have to make arrangements for that before you ship.

(Testimony of Frank H. Whitten.)

Recross-examination.

By Mr. HARTMAN.—There were only five cars of this shipment and not enough to make a special train. They were transported in one of the company's regular freight trains. I understand there were stockpens at Gila Bend, about 125 miles from Yuma. I never unloaded there. I should judge it would have taker about ten hours to have tranported the cattle from Yuma to Gila Bend.

[Testimony of R. H. Field, for Plaintiff.]

R. H. FIELD, being called as a witness on behalf of the plaintiff and first duly sworn, was examined and testified in substance, as follows:

Direct Examination.

By Mr. HAYES.—My name is R. H. Field. I reside at Phoenix, Arizona. Resided near here about five years. Was residing in the valley in July, 1913. Am acquainted with Frank R. Stewart, the plaintiff. I know of Mr. Stewart's having made a shipment of cattle from San Luis Obispo, California, to Phoenix, Arizona, in July, 1913. I rendered Mr. Stewart some service with reference to this. **[94—18]** I went to the office of the Southern Pacific Company, took his letter and his telegram to the office and discussed it with Mr. Gatter in the office. I made some arrangements with Mr. Gatter relative to this shipment. I had a letter from Mr. Stewart from San Luis Obispo, and I took that letter first and discussed it, and I think it was two or three days later I got a telegram from Mr. Stewart—I think it was from Los An-

(Testimony of R. H. Field.)

geles—and I also took that. I think it was some time in the late afternoon of the third of July. I had this conversation with Mr. Gatter in his office at Phoenix. He said that they would bring the cattle up. Mr. Stewart's letter was demanding that the cattle come through from Los Angeles without unloading at Yuma and they assured me that they could get it through. He said they would bring it up from Maricopa either on the passenger or on the other train, and I wired Mr. Stewart to that effect. When I wired him it was almost night. I sent a night letter. I went home when I was through. I went home at night. I was living at Buckeye at that time. That was on the evening of the third of July. I understood that the cattle would be in here, at that time, some time about nine o'clock on the fourth. I went home and attended a celebration and left there about four or five o'clock on the afternoon of the fourth and came back to Phoenix. I could not get hold of Gatter when I came in, or Scott, so I went down to the office at the depot and they told me that it was all off, that the dispatcher had absolutely refused to or that the Tucson people had refused to bring them through. I don't know where the letter or the telegram is. The telegram was addressed to me. I went to the office of the Western Union Telegraph Company, but I could not get a copy of the telegram.

Cross-examination. [95—19]

By Mr. HARTMAN.—(Witness handed paper

(Testimony of R. H. Field.)

marked for identification "Defendant's Exhibit 6.") This is something like the message I received. It is a copy of it. I don't think there is any doubt about that. At that time I lived at Liberty, 25 miles from Phoenix. I did not have any office in Phoenix at that time. I went home the third of July, twenty-five miles from Phoenix. I remember that, because it was the day before the fourth of July, and I remember coming back to Phoenix on the fourth. It was late in the afternoon of the fourth when I got to Phoenix. I went to a picnic and then came here to Phoenix.

[Testimony of Frank R. Stewart, for Plaintiff (Recalled).]

FRANK R. STEWART, being recalled as a witness in his own behalf, testified in substance, as follows:

Redirect Examination.

By Mr. HAYES.—I had a communication with Mr. Fields relative to forwarding this shipment of cattle to Phoenix. I received a reply from Mr. Field. I don't know the station where I got this message, but I got it before we got into Yuma on the morning of the fourth of July. It was relative to arrangements made for the forwarding of the shipment. I gave the telegram to the agent at Yuma. As near as I can recall the wording of the telegram was, "Have arranged through Mr. Gatter to bring you up on passenger train from Maricopa to-night if you reach there in time or you will come up on a freight." I

(Testimony of Frank R. Stewart.)

think it was a night message, probably dated the third of July. I received it the morning of the fourth.

[Testimony of James Ford, for Plaintiff (Recalled).]

JAMES FORD, recalled as a witness for the plaintiff testified in substance as follows: **[96—20]**

Redirect Examination.

By Mr. HAYES.—I saw and heard read the telegram received by Mr. Frank R. Stewart from Mr. Field some time prior to our arrival at Yuma. It was in regard to bringing the cattle up from Maricopa as soon as possible. They were either to bring them on a freight or on a passenger.

[Testimony of Frank H. Whitten, for Plaintiff (Recalled).]

FRANK H. WHITTEN, recalled as a witness on behalf of plaintiff, testified in substance as follows:

Redirect Examination.

By Mr. HAYES.—I saw the telegram testified to by Mr. Stewart, which was received prior to his arrival at Yuma. I did not read it. He read it to me. It said "Arranged with Gatter to bring cattle up."

Recross-examination.

By Mr. HARTMAN.—I don't know what this message was in reply to.

[Testimony of R. H. Field, for Plaintiff (Recalled).]

R. H. FIELD, being recalled as a witness for plaintiff, testified in substance as follows:

Redirect Examination.

By Mr. HAYES.—I don't recall the wording of the telegram, but it was to the effect that they were to bring the cattle up from Maricopa.

Recross-examination.

By Mr. HARTMAN.—I received a telegram from Mr. Stewart and sent him one.

[Testimony of Dr. A. N. Gurley, for Plaintiff.]

Dr. A. N. GURLEY [97—21] a witness on behalf of the plaintiff, being first duly sworn, testified in substance as follows:

Direct Examination.

By Mr. HAYES.—My name is A. N. Gurley. I am a veterinary surgeon. I have practiced my profession twenty-five years. Resided in Phoenix four years. Am acquainted with Mr. Stewart. Was practicing my profession in Phoenix during the months of July, August, September and October, 1913. Was called in my professional capacity to see some cattle in the possession of Mr. Segrist, in the summer of 1913. Some of the cows had bad udders and two or three abortions and general debility of milk cows was about the run of their condition. I think some seven or eleven of the cows died. The effect upon dairy cows of heat prostration is that many times the animal will succumb to the attack

(Testimony of Dr. A. N. Gurley.)

and some may survive it. It generally leaves them in an emaciated condition. Generally, the milk supply would be diminished and many times it would be eliminated. Pouring water on a cow in a state of heat prostration will cause the blood supply to be concentrated, or pass to the brain, the lungs, or the heart, and sometimes direct all the circulation to those organs, and I never approved of the treatment. It also has the effect of stiffening the animal. It would probably save the animal's life in many instances. Heat prostration upon a pregnant cow many times produces abortion. Many times the animal becomes barren after the condition of abortion. Once in a while the animal will survive this condition and come out of it apparently in very good condition.

Cross-examination.

By Mr. HARTMAN.—A dairy cow ought to be milked twice a day—twice in [98—22] twenty-four hours. If they are not so milked it produces ex-extension of the udder and if allowed to continue it will produce what we know commonly as an inflammatory condition of the udder and many times the cow will dry up. Dairy cows should be given access to water continually. Nineteen hours is too long a time for a dairy cow to go without a drink, especially in hot weather. In the kind of weather they have down at Yuma and at Phoenix. A cow is better off if she is milked; there is no question about it. These cows having been loaded on the cars in Los Angeles on

(Testimony of Dr. A. N. Gurley.)

the afternoon of July 3d, and arriving in Yuma on the morning of July 4th, in the hot season of the year like they have at Yuma, and after having been on the cars and in the cars nineteen hours, it would have been much better for them to unload and milk and water than to be transported any further. I am not familiar with the climate around Yuma in the summer, but assuming that the climate of Yuma is something like the climate around Phoenix, in my opinion, dairy cows, which are accustomed to being milked every day and given feed and water, after bringing them from a cool, moist climate, into a climate such as we have around Phoenix, here in the summer-time, in the month of July—it would cause some to become overheated or have heat exhaustion from the climatic conditions, and it would not be good for them.

Redirect Examination.

By Mr. HAYES.—Assuming that these cattle, dairy cows, after having been fed and watered at Los Angeles in the evening about five o'clock, and having been transported from Los Angeles to Yuma, in cars protected by a roof and with open sides, and arriving in Yuma at approximately nine o'clock the next morning, and that the corrals at Yuma had no shade or protection of any sort, with [99—23] sand in the bottom of them and dry manure to a depth of four to six inches, and that the temperature in the city of Yuma was approximately 112 degrees in the shade at the time of their arrival, I would think that the animals would have been better off to

(Testimony of Dr. A. N. Gurley.)

have unloaded them at Yuma and given them a drink of water than to have transported them on and kept them in motion until that evening before unloading them. You have a car of cattle and you pack that car close with cattle and their heat-generating power is greater by the confinement. No, I don't think an animal should go without water that length of time. I don't care what the laws are, that is my opinion, and I think a good fresh drink of water will lower the heat generation faster than anything else, and the point I am trying to make is this, that these cattle would have been perhaps better off if they had had a drink of water in Yuma; but supposing the cattle had been unloaded at Yuma in a corral such as has been described, entirely unprotected by shade, at the hour of ten-thirty in the morning, and remained there unprotected until seven-thirty in the evening, I think they would have been better off without the unloading.

Recross-examination.

By Mr. HARTMAN.—Cattle become feverish on the train when they are packed in the cars. Unloading them often if the pens had any covers and giving them a drink of water would tend to lower the temperature of the animals. I don't mean to say that it would have been better to have brought the cattle on to Phoenix, which would have necessitated keeping them in the cars to exceed twenty-eight hours. Assuming that the cattle would have been on the cars without feed or rest or water for approximately

(Testimony of Dr. A. N. Gurley.)

thirty-three hours and thirty minutes from the time they were loaded in Los Angeles until they would have reached Phoenix, [100—24] if they had come on through without unloading for feed and rest at Yuma, under the conditions existing there at the time, on July 4, 1913, and under the conditions existing through the country where they were transported from Los Angeles to Yuma, in my opinion I believe that the cattle would have been better off if they had been unloaded and watered and reloaded, but I don't think it is the proper thing to leave the cattle there in that condition all day.

In my opinion it would have been better to have unloaded the cattle at Yuma than to have brought them on to Phoenix without water, feed or rest.

Redirect Examination.

By Mr. HAYES.—Assuming that prior to moving the cattle out of Los Angeles they had been well fed and watered and rested, and at the time of their arrival at Yuma, under the conditions referred to, they had been in the cars sixteen hours, and that they were unloaded at Yuma about ten-thirty in the morning, and remained in the corrals until approximately seven-thirty in the evening, and assuming, further, that the shipment would have arrived at Phoenix approximately eleven hours from the stopping of the train at Yuma, I think the cattle would have been better off to have been watered at Yuma.

WHEREUPON the plaintiff rested his case and the defendant, to sustain the issues upon its part,

offered the following evidence:

The defendant thereupon offered in evidence the document theretofore identified by plaintiff, Frank R. Stewart, and marked for identification "Defendant's Exhibit No. 4," being one of the livestock shipping contracts covering the shipment; [101—25] which was admitted in evidence without objection and which document is hereinafter more fully set forth.

Defendant also offered in evidence a certain other document, marked for identification "Defendant's Exhibit No. 5," being one of the livestock shipping contracts covering the shipment, which was admitted without objection, and which is hereinafter more fully set forth.

Defendant also offered in evidence a certain other document theretofore marked for identification "Defendant's Exhibit No. 2," which was one of the livestock contracts covering said shipment; which was admitted without objection and is hereinafter more fully set forth.

Defendant also offered in evidence a certain other document, being a copy of a telegram from R. H. Field to F. R. Stewart, and heretofore marked for identification as "Defendant's Exhibit No. 6," which was admitted in evidence and which is hereinafter more fully set forth.

[Testimony of William Wilson, for Defendant.]

WILLIAM WILSON, being called as a witness on behalf of defendant and first duly sworn, was examined and testified in substance, as follows:

Direct Examination.

By Mr. HARTMAN.—My name is William Wilson. I live now at Yuma, Arizona. I lived in Tucson, Arizona, in July, 1913. My business at that time was chief dispatcher for the Southern Pacific Company. I had been such for eight years. At the present time I am trainmaster. I was chief dispatcher for the Southern Pacific Company at Tucson, Arizona, on July 4, 1913. In a general way my duties as chief dispatcher were to keep track of shipments of livestock, as to the time when they were loaded, when the twenty-eight hours or the thirty-six hours would be up, and **[102—26]** arrange trains to handle such shipments, furnish cars and look after movement of transportation on the division assigned to me. I had jurisdiction over that portion of the road from El Paso to Yuma and two branches and I had charge of the handling of cattle over the road. On July 4, 1913, I was working as chief dispatcher in the office at Tucson. I had something to do on July 4, 1913, with the cattle involved in this lawsuit, in the way of issuing instructions as to the unloading of the cattle. I did it all. The first thing I did was when the yardmaster at Patio, that is the freight yard office at Yuma, called me up at eleven-thirty A. M. on July 4, 1913, and said there were five cars of cattle

(Testimony of William Wilson.)

there. That is the information that came over the telegraph wire to me, that train No. 244 had arrived with five cars of cattle. This information was not recorded in writing at the time. I just listened to the instrument. It is the same as talking over a telephone, only it is in Morse Code that we used by using dots and dashes and it takes a little longer. We do not always record and preserve a record of such communications, not where a train is waiting. Not where it is to be handled within a few minutes. When the yardmaster told me over the wire that there were five cars of cattle at Yuma for Phoenix, on this train, I asked him when they were loaded and received a reply, and he says they want to go through to Phoenix. My reply was, "Wait a minute." I simply got hold of the operator at Maricopa, which is our relay or junction point, and said to him—gave him the information as to where these five cars of cattle were and destination and the time that the thirty-six hours would be up—"Can you handle?" After receiving answer or reply from the operator at Maricopa, I said to the yardmaster at Yuma over the wire "A. & E. (Arizona Eastern) can't handle. The stock will have [103—27] to be unloaded at Yuma unless they desire to come to Gila. We will try to make Gila inside of the twenty-eight hours." The wire was open for a few seconds and the reply came back to me that the gentleman in charge of the stock would hear to nothing except going to Phoenix and that if they were unloaded at

(Testimony of William Wilson.)

Yuma the cattle would be turned over to the company. I then issued instructions that the cattle be unloaded at Yuma. I issued those instructions because the A. & E. (Arizona Eastern) had advised that they could not handle inside of thirty-six hours and it was not satisfactory to the shipper to unload at Gila, and there was no place except Gila to unload between Yuma and Maricopa and no place to unload at Maricopa—no cattle-pens at Maricopa. Gila is 123 miles from Yuma. It would have taken a train about ten hours, counting the necessary delays in getting in and out of Yuma, to have gone from Yuma to Gila. I know what time that train arrived at Yuma on the 4th day of July, 1913, which brought these cattle from Los Angeles. This train arrived at Yuma at 11:35 A. M. on July 4, 1913, mountain time, which is the same as ten-thirty-five Pacific time or Los Angeles time. That same train which brought the cattle into Yuma from Los Angeles, and from which the cattle were unloaded at Yuma, arrived at Maricopa at ten forty-five P. M., July 4, 1913. We keep a record of each train that is moving over the division, the time that the men are called to go to work, the engine number, the train number, the names of the men who are on the train, the time the train departs from Yuma, and as it passes each station until it gets to its destination. I have this record here. It is called the train sheet. (Witness produces train sheet). A train sheet is started each night at 12:01 A. M. That is when the day starts. A

(Testimony of William Wilson.)

record of each movement of each train or engine is kept on that sheet for the [104—28] day's business, and the time that they pass from one station to the other is reported by the operator at that station, and the dispatcher wherever he is located, and whenever the train finally gets to the end of the run and the crew is released, that is noted on the sheet, and the sheet is kept until all the trains that started out on that sheet complete their runs for the period of twenty-four hours. This train sheet is one of the records that a railroad company keeps in the ordinary course of handling its business. (Train sheet marked for identification as "Defendant's Exhibit No. 7".) Mr. H. W. Howard, train dispatcher, was present at Tucson, in the office, at the time and heard the telegraphic conversation take place that I have just related. He was handling these trains on this train sheet from Tucson to Yuma. That is, he wrote this information down here and wrote these figures down on this train sheet as to the time of arrival and departure of trains and issued orders to these trains, that is, where they would meet and pass. Mr. Howard was handling the telegraph key at the time between Tucson and Yuma. (Witness handed train sheet marked for identification "Defendant's Exhibit No. 7."). This is one of the train sheets I have just been describing. This is a train sheet dated July 4, 1913, and covers that portion of the road from Yuma to Tucson—shows the movement of each train for the time it left until it arrived at its destination.

(Testimony of William Wilson.)

It shows a correct record of the arrival and departure of each and every train on the road between Yuma and Tucson on that day at each station where there was an operator on duty. It shows a correct record of the time that the train which brought the cattle into Yuma arrived at Yuma. It arrived at Yuma at eleven-thirty-five A. M., July 4, 1913, mountain time, or ten thirty-five Pacific time. Mr. Howard, who was on duty at that **[105—29]** time as train dispatcher wrote down these figures of the arrival of this train at Yuma. Mr. Howard is here. All these records and the operation of the trains were under my charge and control.

Defendant offers in evidence the train sheet heretofore marked for identification "Defendant's Exhibit No. 7," which was admitted and which is hereinafter more fully set forth.

At that time I had had about fifteen years' experience handling cattle shipments over railroads, about twenty-five years' experience altogether.

If these cattle were loaded at Los Angeles at four twenty-five P. M. on July 3, 1913, and if they had been transported on after arrival at Yuma, to Phoenix, without unloading them at Yuma, they would have been on the cars in the neighborhood of thirty-six hours and thirty minutes or thirty-seven hours.

Assuming that the cattle were loaded in Los Angeles at four forty-five P. M. on July 3, 1913, it would have been impossible to have transported them to Phoenix without unloading them at Yuma within

(Testimony of William Wilson.)

twenty-eight hours—it would have been absolutely impossible. It might have been possible to have made Gila, and when I suggested that the shipper go to Gila I took a great responsibility on my shoulders, but I was willing to take the chance. Assuming that these cattle were loaded at Los Angeles at 4:45 P. M. on July 3, 1913, and arrived at Yuma at 10:35 A. M., I understood that they had been in the cars eighteen hours and ten minutes, it would have taken that train about an hour and ten minues to have gotten out of the yard at Yuma. That is the best we could do on a train of that kind. There was not enough of these cattle to justify running a special train. [106—30]

I don't know of any cattle-pens in Arizona, or any place else for that matter, that have sheds over them for shade for the cattle.

Cross-examination.

By Mr. HAYES.—Our cattle-pens at Gila have no shade trees about them. This freight train upon which the cattle were shipped out of Los Angeles was designated as Number 244. It is a through freight but not very fast. (Referring to train sheet.) There are two trains here scheduled "244"—two sections of 244 on that day. This train which carried this shipment of cattle into Yuma, as I understand it, on this train sheet, is second 244. The other train, designated as First 244 on the train sheet is a melon extra. That train only came from the Imperial Valley. That was a melon train of fifty-one cars, more or less. The information which came over the wire

(Testimony of William Wilson.)

from Yuma was also to the effect that this train brought the cattle into Yuma. As to the wire conversation with Yuma I am speaking from memory, but as to the reply I received from the operator at Maricopa, that is in writing and I think is in the possession of Mr. Hartman, our attorney here. (Witness handed a document.) I have seen this before. It was made under my direction at 11:48 A. M. on July 4, 1913. This is the memorandum which I had made at the time with reference to the transaction. I had figured that the thirty-six hours would be up about 4:45 A. M., July 5, 1913. Mr. Shreeve was the operator at Maricopa. This notation here "Tell DS no, can't handle them" means that "DS" was the dispatcher's call at Tucson. That is the reply received from Phoenix—"Tell DS"—that is tell me at Tucson—"can't handle."

I have a record of the time the train departed from **[107—31]** Yuma which brought these cattle into Yuma. It left Yuma at 12:50 P. M., July 4, 1913, one hour and fifteen minues after it arrived from the west. In other words, it was in the yards at Yuma one hour and fifteen minutes. The train sheet shows that the train arrived at Gila at 7:20 P. M., July 4, 1913. That train would not have arrived at Gila as soon as it did if it had taken the five cars of cattle.

I made a proposition to the shipper of these cattle—suggested that they be forwarded to Gila. I suggested this to the yardmaster at Yuma. After I suggested this to the yardmaster at Yuma the wire

(Testimony of William Wilson.)

was open for a few minutes at the other end. That was after I had stated to the yardmaster at Yuma that the Arizona Eastern could not handle the cattle, that they must be unloaded and suggested to the man in charge that he come on to Gila—and then the reply comes that he has flew off the handle and turned them over to the company. I knew the weather conditions at Yuma and knew we had stock-pens at Gila. I knew the cattle, if they had been transported on from Yuma in that train would have arrived at Gila in the evening. I did not know they could have reached Gila within the twenty-eight hour period, but I was willing to take a chance and put passenger trains in the sidings if necessary in order to do something to help out. This train did actually arrive at Gila within the twenty-eight hour period. The reason that I did not direct the shipment to move on to Gila was that the man in charge says "nothing doing, I won't unload at Yuma, Phoenix is where I am going and I won't consent to anything else." And another reason was, we only had an agent at Gila to unload the cattle and at Yuma we had forces and were better prepared. We had no way to take care of the cattle at Gila. We only have an agent there. The freight train crew **[108—32]** does not help to unload. We had feed and water at Gila—which could be obtained if the shipper is there to help out. The shipper always orders his own feed. I have never seen it handled any other way. I had nobody at Gila to unload the cattle except the agent. The distance from Gila to Maricopa is 42 miles, of which 20 is up

(Testimony of William Wilson.)

a one per cent grade. That train made the run from Yuma to Maricopa in approximately ten hours, but the reason for that was that the tonnage was reduced by taking out these cattle at Yuma, otherwise it would have been two hours longer. If the five cars of cattle had remained in that train it would have been necessary for the train to have doubled one of the hills which would have caused a delay of an hour, and with the extra five cars of cattle they would have been unable to make this time, which would have put it into Maricopa at least an hour and a half or two hours later. This train did arrive at Maricopa within about twenty-nine hours from the time it left Los Angeles, assumnig that it left Los Angeles at 5:25 P. M. of July 3, 1913. The reason Mr. Howard was in a position to hear the conversation that transpired between the yardmaster at Yuma and myself, over the wire, was that the dispatchers have a table almost as large as this one (pointing to a table in the courtroom). One instrument is attached to what is called the train wire over the entire division, and there is nobody touches that wire unless it is the train dispatcher or the chief dispatcher or the chief dispatcher authorizes it. The dispatcher is sitting there ready to send out orders at all times, or to sign up conductors' names to train orders or to put down these reports on the sheet here as the train goes by each station. Naturally, owing to the importance of the stock, this wire was used to convey the information to me, and I, being in the office [109—33] there, heard the first of the conversation, and, to be

(Testimony of William Wilson.)

frank, when they mentioned five cars of cattle, July fourth, I questioned as to what kind of a man would be doing shipping of cattle across the desert on July fourth, and I immediately came over there and used Mr. Howard's wire for the conversation and Mr. Howard took part of it himself. That is the way he knows. While one of us would be using the wire the other would be listening. If a shipper comes in and says I want to sign a release, a thirty-six-hour release to make a certain point, it is the duty of the agent to hand him the release.

[Testimony of Horace W. Howard, for Defendant.]

HORACE W. HOWARD, being called as a witness on behalf of the defendant and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr. HARTMAN.—My name is Horace W. Howard. I live in Tucson, Arizona. On July 4, 1913, I was train dispatcher at Tucson for the Southern Pacific Company. I had jurisdiction over the road from Tucson to Yuma. Went on duty at eight o'clock in the morning and off at four in the afternoon. (Witness handed train sheet marked for identification "Defendant's Exhibit No. 6." I have seen this train sheet before. I had considerable to do with making it between eight in the morning and four in the afternoon of July 4, 1913. I put down most all of the figures which appear on this train sheet between eight in the morning and four in the evening. This is a correct record of the arrival of

(Testimony of Horace W. Howard.)

each and every train on the division between Yuma and Tucson on July 4, 1913. I kept all of this record between 8 A. M. and four P. M. of that day. While I was working there on July 4, 1913, I heard the conversation over the wire that took place, as related by Mr. Wilson, the witness who **[110—34]** preceded me, with reference to these five cars of cattle. The train came into Yuma at 11:30 in the morning and I reported to Mr. Wilson that they had five cars of stock for Phoenix, and Mr. Wilson gets in communication with Phoenix to find out whether they could handle these cattle and they said that they would have no connection. Then Mr. Wilson told me that they would have to be unloaded as Phoenix could not handle them—would have no train to handle the five cars of cattle on their arrival at Maricopa, but he suggested that they come on to Gila if this gentleman wished it, but he did not want to come so they had to be unloaded, as there would be no connection at Maricopa. I put down these figures here on this train sheet showing the time of arrival at Yuma. I was operating the train wire in my office. I was the only one who did handle it unless Mr. Wilson wanted to handle it.

Cross-examination.

By Mr. HAYES.—I am not now in the employ of the Southern Pacific Company. I have not been for two years. I have a pass from Tucson to Phoenix and return from the Southern Pacific Company—a trip pass. I expect the Southern Pacific Company

(Testimony of Horace W. Howard.)

to pay my hotel expenses here and they have paid a part of them. I think I heard all the conversation that transpired between Mr. Wilson and the Yuma and Maricopa agents, because I sat right there and I never left the office from eight in the morning until four in the afternoon. (Referring to train sheet.) I put down these figures here showing the arival of the train at Yuma at the time this shows here or five or ten minutes after. I had been employed as a dispatcher for thirty-one years and a half. I had nothing to do with the running of trains on the Arizona Eastern Railroad from Maricopa to Phoenix. All [111—35] I had to do was to run the trains on the Southern Pacific between Tucson and Yuma.

Redirect Examination.

By Mr. HARTMAN.—I have not seen this train sheet from the time that I made it up until a few days ago. It has not been changed in any particular. These are my figures.

[Testimony of O. M. Shreeve, for Defendant.]

O. M. SHREEVE, being called as a witness on behalf of the defendant, and first duly sworn, testified in substance as follows:

Direct Examination.

By Mr. HARTMAN.—My name is O. M. Shreeve. Live at Maricopa, Arizona. Lived there about eight years. I was employed as telegraph operator for the Southern Pacific Company at Maricopa on July 4, 1913. (Witness shown document containing two

(Testimony of O. M. Shreeve.)

pages, marked for identification "Defendant's Exhibit No. 9".) I had a telegraphic conversation with the dispatcher at Tucson and with the dispatcher of the Arizona Eastern at Phoenix, Arizona, on July 4, 1913, with reference to these five cars of cattle. I kept a record of that conversation. This memorandum here that is marked for identification "Defendant's Exhibit No. 9" is the record of that conversation that I made. I made this record at the time the conversation occurred. Refreshing my recollection from this memorandum, I will state the dispatcher at Tucson called me and told me to ask Phoenix if he could handle stock at ten-thirty or eleven P. M., and I asked Phoenix and he said no. The Tucson office then called me and said the man in charge of stock said he had a message from Gatter that they would handle on passenger train. I told Phoenix this and he said Gatter was expecting stock to come here at 6:00 P. M. **[112—36]**

Cross-examination.

By Mr. HAYES.—I did not wire to Mr. Gatter. I wired to the dispatcher at Phoenix. The dispatcher told me that Mr. Gatter expected the cattle to arrive at six P. M. I don't know what Mr. Gatter said. I did not have any information from Phoenix that Mr. Gatter had arrived to handle this shipment on the passenger train. The information I had was that Mr. Gatter was expecting the stock to arrive at six P. M. at Maricopa. I obtained that information from the dispatcher at Phoenix. I am still in the

(Testimony of O. M. Shreeve.)

employ of the Southern Pacific Company at Maricopa. Also employed by the Arizona Eastern—both companies. I don't know what time the passenger train of the Arizona Eastern left Maricopa on the evening of July fourth, 1913.

[Testimony of A. R. Gatter, for Defendant.]

A. R. GATTER, being called on behalf of the defendant and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr HARTMAN.—I am now and was in July, 1913, general agent of the Arizona, Eastern and Southern Pacific Company, in Phoenix, Arizona. I know Mr. Frank R. Stewart, the plaintiff in this case. I knew him at that time. Also Mr. Field. I heard the testimony of Mr. Field here this morning. To the best of my memory no such conversation took place between Mr. Field and myself as related by Mr. Field. I did not on the part of the Arizona Eastern Railroad Company agree or promise to handle these cattle from Maricopa to Phoenix on a passenger train or any other way. Mr. Field came into my office several times prior to the arrival of these cattle. He came once with a letter from Mr. Stewart written from San Luis Obispo, if I remember correctly. I can't [113—37] recall the exact contents of the letter. As I remember, Mr. Stewart said in the letter that he was going to ship some cattle from San Luis Obispo to Phoenix and that he wanted to run through with them from Los Angeles

(Testimony of A. R. Gatter.)

to Phoenix. I don't remember exactly what I said, but I know that I never would have said that they could come through because I could not tell. At that time I did not know and Mr. Stewart did not know when they were coming. If they arrived at Maricopa in time to connect with our train we would have brought them through. As I recall it, Mr. Field told me that he was wiring Mr. Stewart at Yuma or would wire him at Yuma, or something to that effect.

Cross-examination.

By Mr. HAYES.—I heard Mr. Shreeve's testimony. I don't disclaim entirely having talked with Mr. Field about these cattle. It may have been on July 3d that I told the dispatcher that they would probably reach Maricopa along about six o'clock. That is the last I would have heard of the cattle until July 5th, as my office was closed all day on the fourth of July and I was not there. I don't disclaim having made some arrangement with Mr. Field, but it was not for any particular train except as they would get to Maricopa coming from Yuma, as I would not know when they would reach Maricopa, only guesswork as to when they left Los Angeles. I did not arrange with Mr. Field for the forwarding of these cattle on any passenger train, even if they had arrived in time. It would not be my duty to direct the making up of a train for this purpose or the holding of any train at Maricopa for this purpose. That would be the duty of the superintendent. I could not state definitely the schedule leaving time from

(Testimony of A. R. Gatter.)

Maricopa of our passenger train on July 4, 1913. It was somewhere in the neighborhood of about [1[illegible]–38] eight o'clock in the evening. We have no train crews at Maricopa. All crews are in Phoenix. If we have a sufficient number of cars of livestock and other cars to make up a train at Maricopa we would arrange our schedule to handle them, but otherwise we would not.

[Testimony of William H. Francis, for Defendant.]

WILLIAM H. FRANCIS, being called as a witness on behalf of the defendant and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr. HARTMAN.—I live at Tucson, Arizona. I am rate clerk for the Southern Pacific Company and Arizona Eastern Railroad Company. Occupied that position for over five years. I have had considerable experience in handling freight rates and the computation of freight rates. I have with me here the freight tariffs showing the rates in effect on July 1, 1913, San Luis Obispo, California, to Phoenix, Arizona.

It was here stipulated by counsel for the respective parties that in July, 1913, there was more than one rate in effect on livestock, on the lines of the Southern Pacific Company and its connecting carriers, from San Luis Obispo, California, to Phoenix, Arizona. That there was in effect at such time, in accordance with the tariffs, a sliding scale of rates based upon the valuation per head of the livestock.

(Testimony of William H. Francis.)

That if the cattle involved in this suit had been shipped on a higher valuation, a higher rate would have been assessed against such shipment, in accordance with such tariffs, and that the tariffs in effect provided for such different rates in accordance with the declared valuation as specified in the livestock shipping contracts. That such tariffs are and were on [115—39] file with the Interstate Commerce Commission.

(WHEREUPON, an adjournment was taken until 9:30 A. M., the following day.)

Hearing resumed at 9:30 A. M., October 28, 1915.

[Testimony of C. S. Norman, for Defendant.]

C. S. NORMAN, being called as a witness on behalf of the defendant and first duly sworn, was examined, and testified in substance, as follows:

Direct Examination.

By Mr. HARTMAN.—My name is C. S. Norman. Am freight agent for the Arizona Eastern Railroad Company at Phoenix and was so employed in July, 1913. I have had conversations in a business way with Mr. Stewart. I remember about this shipment of cattle made by Mr. Stewart which came in here on July 5, 1913. I was on duty at that time in my office. I did not state to Mr. Stewart on or about July 5, 1913, in the freight office of the Arizona Eastern Railroad Company, at Phoenix, Arizona, or at any other time or place, that he could take these cattle away from the Arizona Eastern Railroad Company's pens without paying the freight on them. I

(Testimony of C. S. Norman.)

did not at that time or at any other time or place authorize Mr. Stewart to unload those cattle and take them away from the pens without paying the freight. I did not hear anybody in my office connected with the Arizona Eastern Railroad Company, at that time and place or at any time and place, state to Mr. Stewart that he could take these cattle away without paying the freight. Mr. Christiensen was my assistant at that time. His duties were those of assistant agent. He simply acted as my representative while I happened to be out of the office. It was either his duty or mine to collect the freight charges on shipments arriving at Phoenix. I made several efforts to get Mr. Stewart on the telephone but [116—40] it was two or three days later when we got into communication with him and he came to the office and the freight bills were presented to him and he refused payment for the reason stated that he had a claim against the railroad company for damages and it was his desire to make a settlement all at one time. I asked him why he had taken the cattle without paying the freight and his reply was that he thought it was best that he should take them. He stated that he had a claim against the carrier for damages, or words to that effect. I think that was within ten days of the time that he had taken the cattle. I had been trying to get him for two or three days over the telephone but that conversation took place the first day I could get in touch with him. He did not at that time hand me any written claim for damages. He did afterwards.

(Testimony of C. S. Norman.)

Cross-examination.

By Mr. HAYES.—It is our duty to collect all freight charges prior to delivery. It is our practice now to unload cattle into the stock-pens and lock the pens until the freight is paid. It was not our practice to do that at the time this shipment came in. The man in charge is supposed to load and unload all stock consigned to himself. The man in charge is not our agent. The contract calls for the loading and unloading by the shipper. We permit them to unload cattle in our stock-pens and then we lock the pens. I did not see this shipment. I could say positively that I was notified of this shipment prior to its arrival. It was the custom to do that. The notice would probably be that so many cars of livestock would arrive. I was instructed to collect the freight charges on five car loads. The sixth car was supposedly an overflow from the balance of the five cars. It is the custom of the road to [117—41] ship overflows without charge. Whenever it is deemed best by the carrier they have every right to do so. The carrier is not limited to the number of cattle it will ship in one car. I did not decline to permit Mr. Stewart to unload his cattle. I did not have the opportunity to decline to deliver the cattle to him at the Union stockyards here in Phoenix.

Redirect Examination.

By Mr. HARTMAN.—After this we made arrangements to unload and lock the corrals.

(Testimony of C. S. Norman.)

Recross-examination.

By Mr. HAYES.—It is our custom to demand payment of freight charges upon an injured animal.

[Testimony of Garfield Christiensen, for Defendant.]

GARFIELD CHRISTIENSEN, being called as a witness on behalf of the defendant and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr. HARTMAN.—I live in Phoenix. Am employed as chief clerk of the Arizona Eastern local freight office in Phoenix and was so employed on July 5, 1913, the same office that Mr. Norman is employed in. I know Mr. Frank R. Stewart, the plaintiff in this case. I did not state to Mr. Stewart on July 5, 1913, in the office of the Arizona Eastern, or at any time or place that he could take his cattle away from the pens without paying the freight on them.

Cross-examination.

By Mr. HAYES.—I did not see Mr. Stewart in our office at the time of the arrival of this particular shipment, on July 5, 1913. **[118—42]**

[Testimony of J. J. Casey, for Defendant.]

J. J. CASEY, being called as a witness on behalf of defendant, and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr. HARTMAN.—I live here in Phoenix, Arizona. I have lived in and around Phoenix for thirty

(Testimony of J. J. Casey.)

years and am now and have been in the cattle business and farming for thirty-five years. I have had experience in shipping cattle and have shipped cattle over the Southern Pacific Company's lines through Yuma. I have been to Yuma. I have seen the cattle pens of the Southern Pacific Company at Yuma. I have had occasion to see and inspect and examine other cattle-pens in other places in Arizona and in the southwest, which are used for the purpose of unloading and feeding cattle.

Q. How do the cattle-pens of the Southern Pacific Company at Yuma compare with the cattle-pens at other places in Arizona, and in the southwest that you have seen and observed?

Objection to question by counsel for plaintiff as immaterial, which objection was sustained by the Court, and which ruling of the Court was then and there excepted to by counsel for defendant.

I believe I did see some of these cattle testified about by Mr. Stewart, which he shipped in here on July 5, 1913. I saw them at the Union Stockyards at Phoenix and some of them at a later time about three or four miles west of Phoenix. The cattle that I saw were in very poor condition—that is, no flesh, very poor in flesh.

Assuming that these cattle—152 head of dairy cows shipped from San Luis Obispo, California, on July 1, 1913, left San Luis Obispo about five o'clock in the afternoon and [119—43] were transported to Los Angeles, California, and there unloaded for feed and

(Testimony of J. J. Casey.)

rest on July 2d, 1913, and reloaded at Los Angeles on the evening of July 3, 1913, leaving there about five o'clock in the evening, having remained in the pens at Los Angeles for 26 or 27 hours, and having been fed and watered while in such pens, and arriving at Yuma the next morning, July 4th, at 10:35 A. M. Pacific time, or 11:35 A. M., Mountain time, after having been transported through the Southern California desert at that season of the year, and the weather being very hot at Yuma at the time of arrival at that place, the sun shining very hot, and the cattle having been unloaded from the cars immediately after arrival at Yuma, in the middle of the day, into the pens of the Southern Pacific Company used for that purpose at that time, for unloading and feeding, the pens having no shade over them, no sheds and no shade trees, and there being white sand on the ground in the pens mixed with manure, and there being plenty of water in the pens for the cattle to drink, the cattle not having had anything to drink since being loaded on the cars at Los Angeles, and after having been unloaded into the pens at Yuma, remaining there seven or eight hours and loaded into the cars again in the evening; and if shipping the cattle on from Yuma to Phoenix, without unloading them for feed or rest would have kept the cattle in the cars from thirty-three hours and thirty minutes to possibly thirty-six hours from the time they had been loaded on the cars in Los Angeles, and assuming that the cattle were loaded into regular, ordinary stock-cars used by railroad companies, with a cover

(Testimony of J. J. Casey.)

and with openings between the slats on the side; also assuming that the cattle had been milked twice while they remained in the pens at Los Angeles, it is my opinion that it was more humane and better for the cattle to **[120—44]** unload them at Yuma under those conditions and give them feed, water and rest, than to have transported them on from Yuma to Phoenix without unloading for feed, rest and water, especially these cows being milk cows and dairy cows and milking. I think it would have been better for the cows to have unloaded at Yuma. It seems to me that they were going too long a time since leaving San Luis Obispo without being milked oftener than they were. It does not look to me like they would be very good dairy cows after they got here. A dairy cow should be milked at least twice a day—twice in twenty-four hours. If we miss milking a cow once—once probably in some cases would not injure and in some cases it would. It affects all animals to go eighteen hours or longer without water in the hot weather. Shipping dairy cows from a cool climate, such as they have around San Luis Obispo, California, into Yuma, Arizona, in July, in the hot summer, would make the animals want more water, and it would be rather hard on them, I should think, coming from a cool climate into a hot climate. They would be more or less affected by the heat in my judgment. Cattle which are raised here in Arizona in the hot climate can stand the climate better than cattle which are brought in from a cool climate. Cattle which are brought in here from a cool climate

(Testimony of J. J. Casey.)

are affected more by the heat in the summer than cattle which are raised here. I know that cattle, and dairy cows in particular, going eighteen hours and thirty minutes without water would be longer than they ought to go without water, and I also think that not milking them for that length of time would be just as bad. I have shipped cattle to and through El Paso, Texas. I have seen the cattle-pens at El Paso, Texas, of the Southern Pacific Company and the other railroads there at that point. None of those cattle-pens there at El Paso, Texas, [121—45] have any sheds over them for shade.

Motion by plaintiff's counsel to strike the testimony of this witness with reference to there being no sheds over the cattle-pens at El Paso, Texas. Which motion was granted by the Court, and to which ruling defendant then and there excepted.

Q. Mr. Casey, how did the cattle-pens of the Southern Pacific Company at Yuma compare with the cattle-pens in other places of like climatic conditions, with reference to having sheds over them for shade?

To which question counsel for plaintiff objected for the reason that the same was not a comparative question and had no tendency to prove or disprove any issue. Which objection was sustained by the Court, and to which ruling by the Court counsel for defendant then and there excepted.

I never saw any cattle-pens with shade over them.

(Testimony of J. J. Casey.)

Cross-examination.

By Mr. HAYES.—I have been a dairy man for a good many years before I fed cattle. For the past several years I have been a cattle feeder—purchase cattle off the range and feed and finish them for the beef market. I have shipped feeder cattle, both cows and steers, into the valley from other points within the State to and around Phoenix. I have also shipped cattle out of the State. I have shipped beef cattle from Phoenix to Los Angeles. I never have shipped from Phoenix to Los Angeles without unloading. I have shipped cattle from Phoenix to Kansas City.

Redirect Examination.

By Mr. HARTMAN.—These cattle having been kept in the cars eighteen hours and ten minutes from Los Angeles to Yuma during that season of [122—46] the year, in the hot weather, I should judge that they would be feverish and dry in a general way. After being on the cars for that length of time without water in the hot weather, and if they were turned out and given too much water to drink it would have a bad effect on them, I should think, by drinking too much water. Frequently it has been my experience that cattle that drink too much water lay down and die in a very short time.

Recross-examination.

By Mr. HAYES.—I have made shipments of cattle during the summer-time. The largest shipment I ever made was made on the 23d of June.

[Testimony of George Davis, for Defendant.]

GEORGE DAVIS, being called as a witness for defendant, and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr. HARTMAN.—I live at Phoenix at present. Have lived in and around Phoenix, about all my life, about 36 years. Am in the cattle business and cattle shipping business in this country. I have shipped a good many cattle in and out of Arizona. I have heard the hypothetical question propounded to Mr. Casey. Am familiar with the cattle-pens at Yuma, Arizona. In my opinion it was better to unload the cattle at Yuma than to have shipped them on to Phoenix without unloading for feed and rest. If the cattle are kept in the cars eighteen hours and ten minutes at that season of the year in that kind of a place and through that kind of a country, the necessary result would be, if you kept them on for a period of twenty-five to twenty-eight hours, that they would begin to get tired and lay down and the others would trample over them. As an average, when they run over that [123—47] period of time, the longer you keep them in the cars the more tired they get. They get very tired and they would want a drink of water very badly after having been on the cars eighteen hours. Cattle get feverish in the cars to a certain extent and it makes them want water being confined in the cars. The cattle would be better off out in the open, even though in the sun, where

(Deposition of George Davis.)

they had plenty of room to move around than they would be crowded up in the cars. Sand mixed with manure in the cars would not hurt the cattle. We use that for bedding the cars. Sand and manure is what we bed the cars with. It is soft. That is what the cattle stand on in the cars.

It was here stipulated by the parties by their respective counsel that the record show that the same questions were propounded to this witness as were propounded to the witness J. J. Casey, with reference to sheds over the cattle pens at Yuma and other places in Arizona and in the southwest, and the same objections made by counsel for plaintiff and the same rulings by the Court were made with respect thereto, and exceptions as to the rulings then and there made by counsel for defendant.

Cross-examination.

By Mr. HAYES.—I have been in the cattle business in and around Phoenix, Arizona, for the last twenty-eight years. I am in the dairy business now. My experience in shipping has been in shipping beef cattle in to the coast—gathering and shipping for others. I have never lived in Yuma. I was never there on the Fourth of July. I have been through there during the month of July. The effect of summer heat on loose sand naturally makes it warm. I could not say that standing in the hot sand would be restful to an animal. Assuming that the corrals at Yuma [124—48] were entirely unprotected from the rays of the sun and that the cattle were unloaded

(Deposition of George Davis.)

into the pens in the middle of the day on July 4th, the pens being in the condition as described, loose sand and manure, certainly an animal coming out of a car would rest in such pens. It would be better than having them in the cars. At the present time I am not employed by anybody. I have never been in the employ of the Southern Pacific Company. I have frequently shipped cattle from Phoenix to Los Angeles without unloading. At times they went through all right. I could not say that every time.

Defendant offers in evidence the deposition of

[Deposition of Frank Witkosky, for Defendant.]

FRANK WITKOSKY, in substance as follows:

My name is Frank Witcosky, 27 years old, reside at San Luis Obispo, California, and am a cattle buyer. From February, 1906, to November, 1913, I was employed driving cattle in the county of San Luis Obispo, California. I saw one of these cows shipped by Mr. Stewart from San Luis Obispo. She could not travel with the others and had given out and fallen down on the road to San Luis Obispo. She was poor and weak and could not travel. In July, 1913, there was very little feed around San Luis Obispo on the range for cattle. There was no rain there that summer. It is hotter in Yuma and Phoenix, Arizona, in the month of July, than it is in San Luis Obispo.

Defendant then read in evidence the deposition of

[Deposition of Ed Peterson, for Defendant.]

ED PETERSON, in substance as follows:

My name is Ed Peterson, twenty-four years old, live in San Luis Obispo, California. My business is farming and dairying. I was so engaged in July, 1913. I helped to drive **[125—49]** some of these cattle into San Luis Obispo, into the cattle-pens of the Southern Pacific Company at that place. I was raised on a dairy ranch near San Luis Obispo, California, and have handled cattle for more than six or eight years. I examined and looked at these cattle shipped by Mr. Stewart at about the time they were shipped. The cattle were poor and weak. One of the cows fell down two or three miles before reaching the cattle pens at San Luis Obispo and she laid there and rested two or three hours and she was then driven into the pens where the other cattle were. The feed for stock around San Luis Obispo, where these cattle came from was dry and very short in July, 1913. No rain there that summer and very little feed.

Defendant offered and read in evidence the deposition of

[Deposition of Millard Peterson, for Defendant.]

MILLARD PETERSON, in substance as follows:

My name is Millard Peterson. Twenty-three years old. Reside at San Luis Obispo, California. Occupation farmer. I helped to drive these cattle into the cattle-pens at San Luis Obispo, California. I was raised on a cattle ranch. Have handled cattle

(Deposition of Millard Peterson.)

almost all my life. I examined and looked at these cattle shipped by Mr. Stewart. They were in very poor condition and weak. One of the cows gave out on the road after it had laid down a couple of times on the road and had to rest for several hours before we could get her to the railroad cattle pens in San Luis Obispo. Some of the cows were quite old. There was very little rain in 1913 in the country where these cattle came from. The only stock feed was grass and that was dry and very scarce and short.

Defendant offered and read in evidence the deposition of

[Deposition of F. D. Martin, for Defendant.]

F. D. MARTIN, **[126—50]** in substance as follows:

My name is F. D. Martin. Fifty-eight years of age. Reside in Los Angeles, California. I am corral keeper for the Southern Pacific Company at Los Angeles, California. Was so employed on July 2d and third, 1913. I unloaded, fed, watered and reloaded this shipment of cattle in Los Angeles. I made a record of the unloading and reloading of this shipment in a permanent volume kept by me, showing the time we began to unload the shipment and the time we began to reload the same. I now produce the original record that I made at the time of unloading and reloading this shipment, which the notary has marked exhibit "A." The cattle were unloaded at Los Angeles at 2:45 and 3:00 P. M. on

(Deposition of F. D. Martin.)

July 2, 1913, and were reloaded at 3:40 and 4:25 P. M. the following day, July 3, 1913, remaining in the pens in Los Angeles more than twenty-four hours. While the cattle remained in the pens in Los Angeles they were fed three times, had water in the troughs all the time and kept clean, so that the cattle were well cared for at Los Angeles.

Defendant offered and read in evidence the deposition of

[Deposition of M. E. McKirahan, for Defendant.]

M. E. McKIRAHAN, in substance as follows:

My name is M. E. McKirihan. Residence San Francisco, California. Business freight claim agent of the Southern Pacific Company. On July 1, 1913, and until March 31, 1915, inclusive, I was chief clerk to the Freight Claim Agent of the Southern Pacific Company, in offices located on the third floor of the Flood Building, San Francisco. Since April 1st, 1915, I have been freight claim agent of the Southern Pacific Company, same location. So far as any knowledge I had of any claim having been filed by Mr. Stewart for loss or damage to this shipment, or so far as any knowledge that the freight claim department of [127—51] the Southern Pacific Company had of any such claim the only claim that was filed was received by the Freight Claim Department on or about January 18, 1914.

Defendant here rested its case and the plaintiff offered the following testimony in rebuttal.

[Testimony of C. S. Norman, for Plaintiff (in Rebuttal).]

C. S. NORMAN, being called as a witness on behalf of the plaintiff in rebuttal, testified in substance as follows:

Direct Examination.

By Mr. HAYES.—I made a search of our records for the documentary evidence requested with reference to this shipment. I did not find anything in the way of advance notice that there was any damage to the livestock coming to Phoenix. I have some messages here which I will turn over to you. (Papers handed by witness to plaintiff's counsel.) I cannot find any advance notice of the arrival of this shipment. The notice of the number of cattle being shipped and the amount of freight charges required to be collected is contained in these way bills that accompanied the cattle to destination.

[Testimony of Frank R. Stewart, for Plaintiff (Recalled in Rebuttal).]

FRANK R. STEWART, being recalled as a witness on behalf of the plaintiff in rebuttal, was examined and testified in substance as follows:

Direct Examination.

By Mr. HAYES.—While at Yuma, Arizona with this shipment of cattle, and while in conversation there with the Agent he did not make any statement to me with respect to forwarding the shipment to Gila. Gilas was not mentioned. There was nothing said there at that time with respect to forwarding

(Testimony of Frank R. Stewart.)

this shipment any distance beyond Yuma. I am not acquainted with either Mr. [128—52] Ed Peterson or Millard Peterson or Frank Witcosky. Neither of these gentlemen to my knowledge had anything to do with assisting in driving these cattle into San Luis Obispo. I did not employ Witcosky in any capacity. No animal embraced in this shipment gave out in the course of driving into San Luis Obispo. We did not have any trouble with any animal other than the one which had its leg fractured while being dipped. I had more than one conference with persons purporting to be or representing themselves to be claim agents of the Southern Pacific Company. A gentleman called on me at Phoenix, stating his residence to be at San Francisco and further stated that he was claim agent of the Southern Pacific Company and took up the question of settlement or adjustment of my claim for damages. That was within four or five days from July 5, 1913. I would say I had two conferences with this agent. I also had conferences with the Arizona Eastern local representatives relative to the adjustment of this claim.

[Testimony of Frank E. Whitten, for Plaintiff (Recalled in Rebuttal).]

FRANK E. WHITTEN, being recalled as a witness on behalf of plaintiff in rebuttal testified in substance as follows:

Direct Examination.

By Mr. HAYES.—These cows were driven in three

(Testimony of Frank E. Whitten.)

different bunches into San Luis Obispo, to the best of my knowledge. I was not acquainted with all the gentlemen who did the driving. I don't know Ed Peterson or Millard Peterson. Some people did some driving on some small bunches that I don't know. There was none of the cows gave out driving them into San Luis Obispo. I don't know the witness Witcosky. I heard all the conversation that transpired between the Yuma Station Agent, Mr. Stewart, Mr. Ford and myself, relative to the forwarding of [129—53] this shipment from Yuma. No proffer was made by the agent to forward this shipment from Yuma to Gila. The station Gila was not mentioned.

Cross-examination.

By Mr. HARTMAN.—I did not assist in driving any cattle into San Luis Obispo myself, but I was there when they all came in. I don't know who drove in the small bunches.

[Testimony of James Ford, for Plaintiff (Recalled in Rebuttal).]

JAMES FORD, being recalled as a witness on behalf of plaintiff in rebuttal was examined and testified as follows:

Direct Examination.

By Mr. HAYES.—I helped drive part of these cattle into San Luis Obispo. I have forgotten how many were in that bunch. I am acquainted with two Peterson boys, brothers that used to live out there. No person by the name of Peterson had anything to

(Testimony of James Ford.)

do with driving these cattle into San Luis Obispo. There was not any cattle which gave out on the way except one that had her leg fractured and that I know was left behind. I was present at Yuma during the entire conversation there with the Agent relative to unloading these cattle. The Station Agent at Yuma did not make any statement or proposition with reference to forwarding this shipment to Gila, Arizona. The word Gila was not mentioned in my knowledge. There was no proposition made to transport the cattle to any intermediate point between Yuma and Phoenix.

Cross-examination.

By Mr. HARTMAN.—The Peterson boys may have helped drive some of those other bunches of cattle in, I don't know about that. I didn't [130—54] see them at the stockyards. I was not along with the other bunch of cattle.

[Testimony of Vernon Ford, for Plaintiff (in Rebuttal).]

VERNON FORD, being called as a witness on behalf of plaintiff in rebuttal and first duly sworn, was examined and testified in substance as follows:

Direct Examination.

By Mr. HAYES.—I am the son of James Ford. Am eighteen years old. I assisted in driving some of these cattle into San Luis Obispo. I don't know Ed Peterson. I know Millard Peterson. I don't know Witcosky. No strangers had anything to do with driving any of the cattle into San Luis Obispo,

(Testimony of Vernon Ford.)

the particular cattle which I assisted in driving.

WHEREUPON, both parties rested and the foregoing, including the exhibits as set forth herein, constitutes all the testimony and evidence in the case.

THEREUPON, and before the Court charged the jury, and before argument, the defendant submitted its motion in writing for a directed verdict in its favor, and that in case said motion be denied it have leave to go to the jury; which motion for a directed verdict was denied by the Court. To which ruling of the Court defendant then and there excepted.

WHEREUPON, and before the Court charged the jury, the plaintiff requested the following instructions:

[Instructions to the Jury Requested by Plaintiff.]

"1. The law prohibits a carrier engaged in interstate transportation of livestock, from confining the animals for a longer period than twenty-eight consecutive hours without unloading them in a humane manner into properly equipped pens for rest, feed and water for a period of at least five consecutive hours, unless prevented from doing so by some accidental **[131—55]** or unavoidable cause. The law further provides that the owner or agent in charge of any shipment, may by written request separate and apart from the shipping contract, extend the time for which the animals may be confined to a period of thirty-six hours.

Charge No. 1 was not given by the court and therefore must not be made a part of the record on appeal. WM. H. SAWTELLE,
Judge.

"2. It is as much the duty of such carrier to unload in a humane manner, and into properly equipped pens, as it is his duty not to confine the animals for a period of time in excess of twenty-eight hours without written request of the shipper extending the time, and if you believe from the evidence in this case, that the defendant did not have properly equipped feed and rest pens at the station of Yuma, having in mind the climatic condition prevailing at Yuma at the time of such unloading, and that the defendant unloaded plaintiff's cattle into such improperly equipped feed and rest pens, and that the cattle were injured and damaged thereby, then the defendant is liable to the plaintiff for all such damage and injury.

Charge No. 2 was not given by the Court and therefore must not be made a part of the record on appeal. WM. H. SAWTELLE,
Judge.

"3. If you believe from the evidence in this case, that the plaintiff orally offered to sign and deliver to the defendant, a release extending the time for which said shipment could be confined to the period of thirty-six hours, and that defendant's agent stated to him that such release could not be accepted, and that he had no other alternative but to unload, then such conduct on the part of the plaintiff and defendant constitutes a tender of such release, and the

plaintiff was not required to formally prepare and deliver to the defendant's agent, his release in writing. You are instructed that it is a general rule, that when the tender of performance of an act is necessary to establishment of a right against another party, this tender of offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused.

Charge No. 3 was not given by the Court and therefore must not be made a part of the record on appeal. WM. H. SAWTELLE,
Judge. [132—56]

"4. If you believe from all the evidence in this case, that the defendant was negligent in the handling and transportation of plaintiff's cattle, and that such negligence amounted to wanton and willful misconduct on the part of the defendant, then you may disregard if you like, the limitation of valuation fixed in the livestock shipping contract, in estimating plaintiff's damages for the death of his cattle, if you find that any were killed, and find for plaintiff in whatever amount you believe from the evidence to be the actual value of the cattle so killed.

Charge No. 4 was not given by the Court and therefore must not be made a part of the record on appeal. WM. H. SAWTELLE,
Judge.

"5. If you believe from all the evidence in this case, that the defendant was negligent in the handling and transportation of plaintiff's cattle, and that such negligence amounted to wanton and willful misconduct on the part of the defendant, then I instruct

you that you are at liberty to award to plaintiff punitive or exemplary damages, not however to exceed to sum of one thousand dollars ($1000) the amount asked for in his complaint, in addition to such sum as you may find as compensatory damages for the actual loss and damage sustained.

Charge No. 5 was not given by the Court and therefore must not be made a part of the record on appeal. WM. H. SAWTELLE,
Judge.

"6. If you believe that eighty-seven head of plaintiff's cattle or any lesser number were damaged as set forth in plaintiff's complaint and as a result of the negligent handling and transportation of his cattle by the defendant, you may award the plaintiff damages in a sum not exceeding twenty dollars ($20) per head, the amount alleged in plaintiff's complaint, and I further instruct you that in arriving at the damage suffered by plaintiff, you may consider the market value of the cattle in their normal and healthful condition, of the grade and quality of plaintiff's cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and [133—57] you may then consider the price for which plaintiff sold his cattle in their injured condition if you find from the evidence the cattle were injured and the difference in their market value in their normal condition and their value in their injured condition, is a proper measure of plaintiff's damages.

"7. If you believe from the evidence in this case, that the defendant had actual knowledge of the

damage and injuries to plaintiff's cattle, then no notice in writing of such damage and injury was required to be furnished the defendant by the plaintiff.

Charge No. 7 was not given by the Court and therefore must not be made a part of the record on appeal. WM. H. SAWTELLE,
Judge.

"8. If you find from the evidence that the defendant had other corrals on its line of road and in the direction in which plaintiff's shipment was moving, into which plaintiff's cattle could have been unloaded within the twenty-eight hour period and in a more humane manner than by unloading at Yuma under the circumstances developed in this case, then it was the defendant's positive duty to transport said cattle to such station for unloading."

WHEREUPON, at the close of the evidence, and before the Court charged the jury, the defendant requested the following instructions:

[Instructions to Jury Requested by Defendant.]

"1. If you believe from the evidence that at the time the cattle mentioned in plaintiff's complaint, arrived at Yuma, Arizona, on the line of railroad operated by the defendant, they had been confined in the cars approximately nineteen hours, without feed and rest, and that plaintiff did not tender to or file with defendant or any of its agents any written request separate and apart from any printed bill of lading or other railroad form, authorizing defendant to confine said animals in said cars for a period of thirty-six hours from the time they had been loaded

into such cars; and that defendant could [134—58] not or was not reasonably sure of transporting said animals from said town of Yuma, in said cars, to Phoenix, Arizona, the place of destination, without confining said animals in said cars for a longer period than twenty-eight hours, then your verdict should be in favor of the defendant.

"2. If you believe from the evidence that at the time said animals arrived at Yuma, Arizona, they had been confined in the cars approximately nineteen hours without feed or rest, and that at said time and place plaintiff tendered to or filed with defendant or its agents, a written request authorizing defendant to confine said animals in cars without feed or rest for thirty-six hours from the time they had been loaded; and you also believe that the Arizona Eastern Railroad Company, the connecting carrier of this defendant, notified defendant *that* the time said animals so arrived at Yuma, or shortly thereafter that it the said Arizona Eastern Railroad Company could not handle said shipment of cattle from Maricopa to Phoenix and get them to Phoenix, the place of destination, within thirty-six hours from the time they had been loaded, then you are instructed that plaintiff cannot recover and your verdict should be in favor of defendant.

"3. If you believe from the evidence that at the time said cattle arrived at Yuma, Arizona, defendant was willing and offered to transport said animals to the station of Gila on its said line of railroad, and there unload said animals for feed and rest, instead of unloading same at Yuma, and that plaintiff refused

to allow said animals to be so transported to said station of Gila, or declined to accept or accede to defendant's said offer to transport said animals to said station of Gila, then you are instructed to find in favor of the defendant. [135—59]

"4. If you believe from the evidence that at the time said animals arrived at Yuma, Arizona, they had been confined in the cars approximately nineteen hours without feed and rest, and that it was more humane and better for said cattle to unload them at Yuma for feed and rest than to transport them beyond that point and keep them confined in said cars, then your verdict should be in favor of the defendant.

"5. If you believe from the evidence that it was less injurious to said animals to unload them at Yuma for feed and rest than to have kept them confined in said cars for nine hours or eighteen hours longer, then you should find for the defendant.

"6. If you believe from the evidence that plaintiff made and entered into with defendant the written contracts as pleaded by defendant, providing that in case *of* any loss or damage should be sustained to said animals in said shipment for which defendant would be liable, that plaintiff should make written demand on defendant within ten days after unloading said animals at destination; and that it was possible for plaintiff to have made such demand within such time, then you are instructed that plaintiff cannot recover *fro* any loss or damage to any of the animals so delivered at destination; but you are further instructed that as to any animals that may

have died in transit, or at destination while the same were still in the possession of the railroad company, plaintiff was not required to give such notice.

"7. Defendant has pleaded that the animals mentioned in plaintiff's complaint were transported by it and its connecting carrier under three certain contracts in writing, the execution of which contracts plaintiff has admitted.

These contracts provide, among other things, that in case [136—60] any loss or damage resulted to said animals in transporting same, for which defendant would be liable, the plaintiff would within ten days after unloading same at destination, make written demand upon defendant therefor, and that in the event of failure to make such written demand within such time that all claims for such loss or damage were expressly waived and made void.

You are instructed that such a provision is reasonable and that if it were possible for plaintiff to have given such notice within such time and he did not do so, then you are instructed that plaintiff cannot recover of defendant for any loss or damage to any of the animals delivered to him at destination; but that said provision as to such notice does not apply to any animals that may have died in transit or at destination before being taken away from unloading pens at destination.

"8. If you believe from the evidence that any of the animals mentioned in plaintiff's complaint died within ten days after unloading at destination and that plaintiff did not make written demand upon defendant or any of its agents within ten days after

such unloading for loss or damage to such animals, then you are instructed that plaintiff cannot recover anything for such animals.

"9. If you believe from the evidence that plaintiff knew, or could have known by the exercise of reasonable diligence, within ten days after unloading said animals at destination that eighty-seven head of said animals were injured or damaged in the sum of twenty dollars per head, as alleged by plaintiff, and plaintiff did not, within ten days after unloading said animals at destination make written demand upon defendant or any of its agents for such alleged loss or damage, then you [137—61] are instructed that plaintiff cannot recover for such alleged loss and damage.

"10 If you believe from the evidence that plaintiff could, within ten days after unloading said animals at destination, have given written notice to defendant or any of its agents, of any of the loss or damage to any of the animals, for which plaintiff is seeking to recover, and that he did not give such notice within such time, then you are instructed that plaintiff cannot recover for any of the alleged loss or damage to said animals, for which he could have given such notice, but you are further instructed that plaintiff was not required to give such notice as to any animals that may have died in transit or at destination before being removed from unloading pens.

"11. If you believe from the evidence that plaintiff, at the time said animals were delivered by him to defendant, at San Luis Obispo, California, for transportation by defendant, over its line of railroad

and the line of railroad of its connecting carrier to Phoenix, Arizona, made and entered into the contract or contracts in writing, as set forth and pleaded by defendant, wherein and whereby it was agreed and stipulated by and between plaintiff and defendant that the agreed vaulation of said animals was the sum of thirty dollars per head; and that plaintiff, by reason of said stipulation that the value of said animals was the said sum of thirty dollars per head, thereby obtained lower and cheaper freight rates for the transportation of said animals from San Luis Obispo, California, to Phoenix, Arizona, than would have been applicable to or assessed upon said shipment had a higher valuation been placed upon said animals; and that plaintiff by said contracts stipulated and agreed that in case any loss or damage should be sustained to said animals for which defendant would be liable, that the amount [138—62] to be claimed by plaintiff for each of said animals, so lost or damaged should be adjusted on the basis of the value of such animals at the time and place of said shipment, to wit, on July 1st, 1913, at San Luis Obispo, California; not exceeding the declared and agreed value thereof, to wit, the sum of thirty dollars per head; and you further find that the loss and damage to plaintiff's said animals, as alleged, was caused by the negligence of defendant as alleged by plaintiff, to wit, the unloading of said animals at Yuma, Arizona; then you are instructed that plaintiff cannot in any event, recover herein, any greater sum for the animals that died in transit or before being removed from pens at destination; then

the said sum of thirty dollars per head and the freight charges on same; and you are further instructed that plaintiff's claim for the animals alleged to have been injured in such transportation should be adjusted on a basis of said declared and agreed valuation of thirty dollars per head and the freight charges on same from San Luis Obispo, California, to Phoenix, Arizona; and that if said animals after delivery at destination to plaintiff were of the value of thirty dollars per head, and the freight charges on same from San Luis Obispo, California, to Phoenix, Arizona, plaintiff is not entitled to recover anything for any of said animals alleged to have been injured.

"12. If you believe that the freight tariffs of the defendant and its connecting carrier, with reference to rates applicable to transportation of livestock from San Luis Obispo, California, to Phoenix, Arizona, in July, 1913, were on file with the Interstate Commerce Commission, and posted and published; and that such tariffs provided for different rates of freight on livestock between such points, based upon declared or agreed valuation; and that at such time said tariffs provided for all higher freight rate on such livestock if a greater value [139—63] than thirty dollars per head should be fixed or placed upon such animals; then you are instructed that plaintiff is charged with knowledge of such higher rate and was bound to know that such higher freight rate was in effect, when he made this shipment.

"13. You are instructed that if the contracts

pleaded by defendant were fairly made and entered into between plaintiff and defendant, and said contracts recite on their face that the consideration therefor was a reduced rate for transportation of said animals, then you are instructed that the law presumes that a *fari* consideration was given and such consideration need not be proven.

"14. You are instructed that the law requires a shipper of livestock, or any other property, by railroad, from a point in one State to a point in another State, to pay to the carrier, so transporting such property, the full, correct amount of freight charges for such transportation, in accordance with the tariffs of such carriers filed with the Interstate Commerce Commission and posted and published, and in effect at time of such shipment; and if you believe from the evidence that plaintiff has not paid to defendant or to its connecting carrier such freight charges on the shipment of cattle involved herein, then you are instructed that plaintiff is not entitled to recover.

"15. If you believe from the evidence that the alleged loss and damage to plaintiff's animals was due to any other cause than unloading them at Yuma, Arizona, then you are instructed that plaintiff cannot recover and your verdict should be in favor of defendant.

"16. If you believe that at the time plaintiff shipped his said animals from San Luis Obispo, California, they were in a poor weak or starved condition, and that any of the loss or [140—64] damage

to said animals, as alleged by plaintiff was due to the condition of said animals at the time they were so shipped then you are instructed that plaintiff cannot recover herein of defendant, for such loss or damage.

"17. If you believe from the evidence that plaintiff caused said cattle to be brought from a cool and moist climate into Arizona, in July, and into an extremely hot and dry climate, and that plaintiff knew of the climatic conditions then existing in Arizona, and the place or places to which he caused said animals to be transported; and any of the alleged loss or damage to said animals was due to such climatic conditions, then you are instructed that plaintiff cannot recover of defendant for such loss or damage.

"18. You are instructed that if plaintiff failed or neglected to attend to unloading his cattle at Yuma, or failed or neglected to properly care for his said cattle while they were at Yuma, and that any of the alleged loss or damage was due to such failure on the part of plaintiff to attend to and care for said cattle, that defendant is not liable therefor and plaintiff cannot recover for any such loss or damage.

"19. You are instructed that plaintiff cannot recover of defendant for any loss or damage to his cattle resulting from heat or climatic conditions, and if you believe that the alleged *lossoor* damage to plaintiff's cattle was due to the heat at Yuma, or to the climatic conditions at that place, then your verdict should be in favor of the defendant.

"20. You are instructed that plaintiff cannot recover anything from defendant in this action on

account of the alleged injuries and damages to the eighty-seven head of cattle mentioned in plaintiff's complaint.

"21. You are further instructed, as a matter of law, that [141—65] plaintiff is not entitled to recover anything in this action, from defendant, for punitive or exemplary damages.

WHEREUPON, the Court charged the jury as follows:

Instructions of Court to Jury.

"Gentlemen of the Jury: This is an action brought by Frank R. Stewart against the Southern Pacific Company to recover from said defendant company the sum of $2,695, compensatory damages and one thousand dollars punitive or exemplary damages for alleged damage and injury to stock shipped by the plaintiff over the lines of the defendant company from San Luis Obispo, California, to Phoenix, Arizona. The defendant, in its answer, denies substantially all of the allegations of the plaintiff's complaint, and in addition thereto, sets up certain matters of defense; thereupon the plaintiff has filed a reply to defendant's answer and special pleas. The complaint, answer and reply have all been read at length in your presence and hearing and I deem it unnecessary at this time to again read them. While it is the province of the Court to deal with the law of the case, it is exclusively your province to pass upon the facts. It is your duty to consider the evidence in the case as a whole, and not to give undue importance to minor points or portions of the evidence

taken piecemeal. Any case involving much testimony and many facts should not be decided upon the probability or improbability of any point singled out of the evidence, but a proper decision requires due consideration to be given to all the evidence, direct and circumstantial, in the case.

I charge you that you are made by law the sole judges of the facts in this case, and of the credibility of each and all of the witnesses who have testified in the case, and of the weight you will give to the testimony of the several witnesses who have appeared before you. In determining the credibility [142—66] of any witness and the weight you will give to this testimony, you have the right to take into consideration his manner and appearance while giving his testimony, his means of knowledge, any interest or motive he may have, if shown, and the probability or improbability of the truth of his statements, when considered in connection with the other evidence in the case. If you believe that any witness has wilfully sworn falsely to any material fact, then you have the right to wholly disregard the testimony of such witness, except in so far as his statements may be corroborated by other credible evidence in the case and by the facts and circumstances proven in the case. It will be your duty in arriving at a verdict in this case to be governed by the evidence in the case, and the law as herein given you, regardless of the condition of the parties hereto, financially, or of the effect of your verdict upon the parties, or either of them. You are to look at the evidence in this case in a common sense light, and to judge it by that ex-

perience and observation of human affairs of which you are possessed as individual members of society, and to endeavor to arrive at the truth as the evidence shows it to be.

By burden of proof, wherever used in these instructions is meant this: That the party upon whom the burden of proof devolves must prove or make out his contention by a preponderance of the evidence. It is the duty of the plaintiff in this case to make out his case by a preponderance of the evidence. The expression, "preponderance of the evidence," means the greater weight of the evidence. It does not necessarily mean that a grater number of witnesses shall be produced upon one side or the other, it means the more convincing proof or the greater probability of the truth of the evidence on one side when compared with, or weighed against, the evidence in opposition. **[143—67]**

You are instructed that direct evidence is not the only evidence which may be considered by the jury. In many cases, circumstantial evidence is both admissible and competent for the consideration of the jury. In arriving at a verdict in this case, as heretofore stated, it is your duty to consider all of the evidence, both direct and circumstantial. Circumstantial evidence is proof of certain facts and circumstances in a given case from which the jury may infer other and connected facts, which usually and reasonably follow, according to the common experience of mankind.

You will observe, gentlemen, that among the allega-

tions in the plaintiff's complaint, is one to the effect that the alleged loss of and injury to the cattle of the plaintiff, was a direct and proximate result of negligent conduct on the part of the defendant company, its agents and employees, in handling and transporting the shipment. In other words, this particular allegation charges negligence on the part of defendant. By negligence is meant the want of reasonable or ordinary care which, under the same conditions and circumstances, would be exercised by persons of ordinary prudence and foresight. Negligence may consist of an act or of failure to act. It is, therefore, such an act as a person of ordinary care, under existing conditions and circumstances, would not do, or such a failure to do something which, under existing conditions and circumstances, a person of ordinary care would have done; or, as the Supreme Court of the United States has said: "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation or doing what such person, under existing circumstances, would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and [144—68] measured by the exigencies of the occasion." The law prohibits a carrier engaged in interstate transportation of livestock, from confining the animals for a longer period than twenty-eight consecutive hours without unloading them in a humane manner into properly equipped pens for rest, food and water for a period of at least five consecutive hours, unless prevented from doing

so by some accidental or unavoidable cause. The law further provides that the owner or agent in charge of any shipment may, by written request separate and apart from the shipping contract, extend the time for which the animals may be confined to a period of thirty-six hours.

In order to enable you to determine whether or not the negligence of the defendant above referred to caused the death of or injury to, any of the cows, you may also take into consideration all evidence with reference to the previous history and condition of the said cows, the climatic conditions, where they were raised and shipped from, their physical condition at the time of shipment, whether or not they had been well cared for and fed in Los Angeles, California, previous to such shipment, the condition of the weather with respect to temperature at the time they were shipped from Los Angeles and at the time they arrived at Yuma, the condition of the cattle when they arrived at Yuma before they were there unloaded, their ages and weights, the condition of their health and strength and all the other facts and circumstances of the trip surrounding and in any way affecting the class and condition of said cattle. It is claimed by the plaintiff that the cattle in question were loaded in defendant's cars the afternoon of July 3, 1913, at Los Angeles, California; that they were transported over defendant's line to the town of Yuma, in the State of Arizona, arriving at the latter place about [145—69] 10:00 o'clock, Mountain Time, or 9:00 o'clock, Pacific Time, the morning of July 4, 1913. As you know, there is a dispute be-

tween the parties as to the time the cattle left Los Angeles and as to the time they arrived at Yuma. Where there is a conflict in the testimony, it is the duty of the jury to reconcile that conflict if they can, so as to make all the witnesses speak the truth. If they cannot do so, then it is for them to determine which of the witnesses they will believe; in other words, the credibility and weight of the testimony is a matter exclusively within the jury's province.

It is also claimed by the plaintiff that upon the arrival of the train at Yuma the defendant company, through its agents, requested the plaintiff, who was accompanying said cattle, to unload the same for rest, feed and water; and that the plaintiff declined to unload said cattle at Yuma, giving as a reason that the cattle were in good condition and that it would seriously injure them or kill them to unload them in the hot sun into the uncovered pens and corrals of the defendant at Yuma.

Plaintiff further claims that he offered to execute and deliver to the defendant company a "written request," extending the period of time within which the cattle might be confined in the cars from twenty-eight to thirty-six consecutive hours. You have heard the testimony on that question—that subject, and I deem it my duty to pass upon the sufficiency of that offer or tender. I charge you as a matter of law that the plaintiff upon arrival of the cattle at Yuma had the right to tender to the defendant such written request for such extension of the time of confinement of the cattle in such cars; and that had he in fact so tendered such written request it would then have

been the duty of the defendant company to have transported the cattle on to Phoenix, Arizona, provided the **[146—70]** same could have been so transported and delivered at their destination within thirty-six hours from the time the train containing the shipment originally left Los Angeles, California. But, the plaintiff having failed to sign and tender such written request, the defendant company was required by the United States Statute to unload, feed, water and rest the said cattle at some point on its line of railroad within twenty-eight hours from the time the same left Los Angeles, California.

I further charge you that it was the duty of the defendant company to unload the cattle for feed, rest and water into pens properly equipped therefor. The statutes of the United States make it the duty of the railroad company to do that. You have heard all the evidence in the case, and it is for you and you alone to determine whether or not the corrals and pens provided by the defendant company at Yuma were such as the law requires railroads to furnish for the proper unloading, feeding and resting and watering of cattle. I say for the proper unloading, feeding, and resting and watering of the cattle. In passing upon this question, you may take into consideration the season when the cattle arrived at Yuma, the climatic conditions thereat at the time, and all of the other facts and circumstances in the case. In this same connection, you may also determine whether or not there was on said 4th day of July, 1913, any other place or station on defendant's line which the train carrying these cattle, and operating on its usual

schedule, could have reached within the twenty-eight hour period, at which the cattle could have been unloaded, fed, watered, and rested under conditions more favorable than existed at said town of Yuma on July 4, 1913. If you find from the evidence that the defendant had other corrals on its line [147—71] of road and in the direction in which plaintiff's shipment was moving, into which plaintiff's cattle could have been unloaded within the twenty-eight hour period and in a more humane manner than by unloading at Yuma under the circumstances developed in this case, then it was the defendant's positive duty to transport said cattle to such station for unloading.

If you find that the corrals or stock pens of the defendant company at Yuma were "properly equipped for the unloading of cattle for feed, water and rest," and that said company used due diligence in the unloading, handling and care of the stock at Yuma, then the defendant would not be liable to the plaintiff for any loss or injury to any of the said cattle.

On the other hand, if you find that the said corrals or stock-pens of the defendant company at Yuma were not properly equipped for the unloading of cattle for feed, water and rest, or that the stock were not humanely handled at Yuma, by the defendant company, its employees, or agents, and further believe from the evidence that as a result of such improperly equipped stock-pens, or of such inhumane handling of said cattle, any of them died or were injured, then and in that event, the defendant would be liable in damages for the value of such of the cattle

as died, not exceeding, however, the sum of thirty dollars per head for each animal so dying, and also for any injury which may have been caused to any of the remaining cattle, not exceeding the sum of twenty dollars per head for each animal so injured. In other words, in order that you may understand, at the time the plaintiff delivered the cattle to the defendant company at San Luis Obispo, California, to be transported to Phoenix, Arizona, he executed a contract in writing, by the terms of which he placed a valuation of thirty dollars per head on said cattle and in which contract or agreement he agreed **[148—72]** "That the amount to be by him claimed for each animal . . . so lost or damaged shall be adjudged on basis of value at time and place of shipment, not exceeding the declared value as hereinbefore set forth . . . and in no event is there to be any recovery . . . for any loss of or damages to said livestock, from whatsoever cause arising in excess of the declared value hereinbefore set forth." The defendant company also pleads that notwithstanding the fact that it may have been guilty of negligence in the particulars set out in the complaint, nevertheless the plaintiff in this case cannot recover, because the contract heretofore referred to (and which was signed by the plaintiff, and by Mr. Ford, and Mr. Whitten, on behalf of the plaintiff, who were thereunto duly authorized) provides that the "second party hereby further agrees that in case of any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by the second party on the freight claim agent

of the first party in writing within ten days after unloading of the livestock; and that in event of failure so to do, all claims for loss or damages in the premises are hereby expressly waived, released and made void" Defendant alleges that no claim for loss or injury to said cattle was presented to it, or any of its agents or employees within the ten-day period. If you find this to be true, then, of course, the plaintiff cannot recover, unless you further find that the defendant waived this provision of the contract, or that the plaintiff was relieved from a compliance therewith as is hereinafter stated. The plaintiff in reply to this contention, that the claim should have been presented in writing within ten days after the unloading of the livestock, alleges that he was relieved from compliance with the above-quoted provision in that "on the 4th day of [149—73] July, 1913, and at all times subsequent to the arrival of said cattle at . . . Yuma. (I say subsequent to the arrival of at Yuma), the defendant had full knowledge and notice of the injuries and damages to plaintiff's cattle as set forth in its said complaint; that said cattle were unloaded by the defendant into its stock-pens at the station of Yuma between the hours of 9 and 10 o'clock A. M., on the 4th day of July, 1913, and between said dated and the hour of 7:30 P. M. of said day, and prior to the reloading of the cattle into defendant's cars, five of said cows died . . . That upon reloading the said cattle it became necessary to provide, and the defendant did provide, an additional car in which to ship thirteen

of the crippled and sick cattle of the plaintiff to their destination at Phoenix; that at various points between said station of Yuma and the city of Phoenix the train officials in charge of said shipment received telegraphic inquiries from other officials of the defendant inquiring as to the condition and welfare of said shipment; that upon the arrival of said shipment at Phoenix, Arizona, one of said crippled animals remained in defendant's car for a period of more than a week; and that immediately after the unloading of said shipment at Phoenix, Arizona, and almost daily from said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizona Eastern Railroad Company and of this defendant were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the plaintiff's cows which arrived at the destination alive, were such as to render it impossible for the plaintiff, or any person else in the exercise of due care and diligence, to determine the amount and extent of damage sustained by the plaintiff within the said ten-day period; that a number of said cattle **[150—74]** died many days after their arrival at Phoenix, Arizona, as the result of such injuries . . . that the defendant has on many occasions prior to the 21st of October, 1913, recognized plaintiff's right to recover in some amount on account of his damages, sustained, as set forth in his said complaint, and has on many occasions attempted to settle and compromise said claim with the plaintiff." I repeat these allegations of the reply in order to show what the plaintiff claims is his reason or

excuse for not having presented his claim in writing to the defendant company or its agents within ten days from the date of such loss or injury, as is provided by the contracts.

I charge you as a matter of law that if you believe the defendant or its agents or employees did know that five or more of the cattle died while in transit, and also believe that the defendant was negotiating with the plaintiff for a settlement of his claim, and that the defendant knew that the cattle had been injured as alleged in plaintiff's complaint, then the plaintiff was relieved and released from the giving of such notice of loss or injury within ten days as required by the provisions of said contracts. The written contracts introduced in evidence limit the liability of the defendant company to thirty dollars for each animal injured or killed, and if you find for the plaintiff you should assess the damages at not exceeding thirty dollars per head for the cattle killed and not exceeding twenty dollars per head, the amount claimed in plaintiff's complaint, for the injury caused to each of said cattle by the defendant's negligence. The measure of damages in case of injury to the cattle under the contract is the amount of actual damages to each of said cattle so injured, resulting from the negligence of the defendant, its agents or employees, in no case to exceed twenty dollars per head. The measure of [151—75] damages as to those that were killed is not exceeding thirty dollars per head. A shipper will not be heard to claim or recover for damages or loss, however

great, in excess of the amount claimed in the bill of lading as the agreed value; nor will the carrier be allowed to deny liability for actual damages up to that amount, except, as in this case, where a less amount is claimed in the complaint, which in this case is twenty dollars per head for each of the cattle injured and not killed. The carrier must respond for negligence up to that value, but no further. If you come to the conclusion that the plaintiff is entitled to recover some damages, then, as I have heretofore stated, the measure of his damages for the eleven head of cattle that died, if you believe they died as a result of the defendant's negligence, would be not exceeding thirty dollars per head, and the measure of damages for the cattle that were injured by reason of the defendant's negligence would be the difference between the market value of the said cattle in their normal condition after making the trip from San Luis Obispo, California, to Phoenix, Arizona, and the condition in which they were actually delivered at Phoenix, but in no event can such injury or damage to each cow be placed at a figure in excess of twenty dollars; in other words, in arriving at the damages, if any, to be awarded to the plaintiff by reason of the cattle injured, if any, through the negligence of the defendant company, the measure of such damages will be the depreciation in the market value of the cattle by reason of such injury or injuries, such damages, in no event, however, to exceed the sum of twenty dollars per head. If you believe that eighty-seven head of the plaintiff's cattle or any

lesser number were damaged as set forth in plaintiff's complaint, and as a result of the negligent handling and transportation of the [152—76] cattle by defendant, you may award the plaintiff damages in a sum not exceeding twenty dollars per head, the amount alleged in plaintiff's complaint, and I further instruct you that in arriving at the damage suffered by the plaintiff you may consider the market value of cattle in their normal and healthful condition, of the grade and quality of plaintiff's cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and you may then consider the price for which plaintiff sold his cattle in their injured condition, if you find from the evidence that the cattle were injured, and the difference in their market value in their normal condition and their value in their injured condition is a proper measure of plaintiff's damages, as I said before, not exceeding twenty dollars per head for the cattle injured.

If, under all the facts of this case and the law as I have stated it to you, you come to the conclusion that the plaintiff is entitled to recover some amount as compensation for the loss of, or injury to, his said cattle, you must *no* render what is known as a "quotient verdict"—that is, you must not add together the amount of the sums which each of you believes the plaintiff is entitled to, and divide by twelve, or any other number. Such or any similar method of arriving at plaintiff's compensation, would be unlawful, and the Court would be compelled to set aside the verdict.

If, under the rules I have stated, you find that the plaintiff is entitled to recover in this action, the amount of the recovery, if any, is for you to determine from all the facts in the case and under the limitations which the law imposes, as already stated to you. It is for you to say, in the exercise of a sound discretion, from all the facts in the case, without fear and without favor, without passion or prejudice, [153—77] what amount of damages, if any, should be awarded.

You are further instructed, as a matter of law, that plaintiff is not entitled to recover anything in this action, from defendant, for punitive or exemplary damages, but only damages for the death or loss of the cattle that died not exceeding thirty dollars per head and the injury to the eighty-seven head not exceeding twenty dollars per head, and you may, if you think proper, and if you find for the plaintiff,—find that the defendant was negligent in the manner set forth in plaintiff's complaint—also assess the sum of twenty dollars expended by the plaintiff, if you believe it was so expended, in the nursing and caring for the cattle in question.

Some testimony has been introduced with reference to the failure of the plaintiff to pay the freight charges on the cattle upon their arrival at Phoenix. I do not see how this question or this testimony affects the question as to whether or not the defendant company was guilty of negligence in the manner as alleged in plaintiff's complaint, although this testimony was introduced without objection of counsel; and if you believe that the defendant was negligent,

under the definition of that term, in the handling of the cattle, and believe that the plaintiff is entitled to recover, then you will render a verdict for the plaintiff, notwithstanding the fact, if it be a fact, that upon the arrival of the cattle at Phoenix, the plaintiff did not pay the freight charges before taking possession of the cattle. In other words, gentlemen, I think that is an issue to be tried in another lawsuit and not in the one now being tried.

If you find for the plaintiff, the form of your verdict will be, "We, the jury, duly empanelled and sworn in the above-entitled cause, upon our oaths, do find for the plaintiff and **[154—78]** assess his damages at . . . dollars," inserting the amount which you determine should be awarded him.

If you find for the defendant, the form of your verdict will be, "We, the jury, duly empanelled and sworn in the above-entitled cause, upon our oaths do find for the defendant."

After you have retired to your jury-room, you will select one of your number as foreman, and after you have arrived at a verdict, if you arrive at one, you will cause your foreman to sign the verdict which represents your conclusions, and return it into court. During the progress of this case you have been allowed to separate. From now on, you will be kept together in charge of the bailiff, during which time you should not communicate the state of your deliberations to anyone, not even to the bailiff, nor to the Court, nor to anyone at all. What transpires in your room should be kept secret until your verdict is returned to the Court, if you arrive at one, or until you

are discharged by order of the Court. Should you fail to arrive at an agreement within a reasonable time, the Court will endeavor to have provision made for your luncheon being furnished you.

[Defendant's Exception to Action of Court in Refusing to Give Certain Instructions.]

THEREUPON, and before the jury retired, the defendant excepted to the action of the Court in refusing to give each of the defendant's instructions numbers 1 to 20, and also excepted to the action of the Court in giving plaintiff's requested instructions, as follows:

"6. If you believe that eighty-seven of the plaintiff's cattle or any lesser number were damaged as set forth in plaintiff's complaint and as a result of the negligent handling and transportation of his cattle by the defendant, you may award the plaintiff damages in a sum not exceeding twenty dollars per head, the amount alleged in plaintiff's complaint, **[155—79]** and I further instruct you that in arriving at the damage suffered by plaintiff, you may consider the market value of cattle in their normal and healthful condition, of the grade and quality of plaintiff's cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and you may then consider the price for which plaintiff sold his cattle in their injured condition if you find from the evidence the cattle were injured, and the difference in their market value in their normal condition and their value in their injured condition, is a proper measure of plaintiff's damages.

"8. If you find from the evidence that the defendant had other corrals on its line of road and in the direction in which plaintiff's shipment was moving, into which plaintiff's cattle could have been unloaded within the twenty-eight hour period, and in a more humane manner than by unloading at Yuma under the circumstances developed in this case, then it was the defendant's positive duty to transport said cattle to such station for unloading."

THEREUPON, and before the jury retired, the defendant then and there excepted to that portion of the Court's charge with reference to transporting the cattle to another station than Yuma, as follows: "In this same connection you may also determine whether or not there was on said 4th day of July, 1913, any other place or station on defendant's line which the train carrying these cattle, and operating on its schedule, could have reached within the twenty-eight hour period, at which the cattle could have been unloaded, fed, watered and rested, under conditions more favorable than existed at said town of Yuma on July 4, 1913. If you find from the evidence that the defendant had other corrals on its line of road and in the direction in which plaintiff's shipment was moving, into which plaintiff's cattle could have been unloaded within the [156—80] twenty-eight hour period and in a more humane manner than by unloading at Yuma under the circumstances developed in this case, then it was the defendant's positive duty to transport said cattle to such station for unloading."

Upon the grounds that it was shown by the evidence that plaintiff abandoned his cattle at Yuma; that the defendant was not reasonably sure of being able to transport the cattle on to Gila or to any other station within the twenty-eight hour period; and upon the ground that it was better and more humane to unload the cattle at Yuma, as was done, than to transport them on to any other station; and upon the ground that it would have been a violation of the twenty-eight hour law, the Federal Statute, to have attempted to take them to any other station.

Defendant also then and there excepted to that portion of the Court's charge with reference to the defendant being liable for unloading the cattle into improper pens or for any other alleged negligent unloading of the cattle, upon the ground that it was the duty of plaintiff to care for said cattle and to assist in unloading and reloading said cattle, under the contracts made and entered into between plaintiff and defendant with reference to the shipment.

The defendant also then and there excepted to that portion of the Court's charge with reference to a certain clause in the shipping contracts in evidence, providing for the ten days' notice to be given by plaintiff to defendant of the alleged loss or damage claimed by plaintiff as to the eighty-seven head sued for in the complaint as follows: "The defendant company also pleads that notwithstanding the fact that it may have been guilty of negligence in the particulars set out in the complaint, nevertheless the plaintiff in this action cannot [157—81]

recover, because the contract heretofore referred to (and which was signed by the plaintiff, and by Mr. Ford and Mr. Whitten, on behalf of the plaintiff, who were thereunto duly authorized) provides that the 'second party hereby further agrees that in case *of* any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by the second party on the freight claim agent of the first party in writing within ten days after unloading of the livestock; and that in event of failure so to do, all claims for loss or damages in the premises are hereby expressly waived, released and made void.' Defendant alleges that no claim for loss or injury to said cattle was presented to it, or any of its agents or employes within the ten-day period. If you find this to be true, then, of course, the plaintiff cannot recover, unless you further find that the defendant waived the provision of the contract, or that the plaintiff was relieved from a compliance therewith as is hereafter stated. The plaintiff in reply to this contention, that the claim should have bene presented in writing within ten days after the unloading of the livestock, alleges that he was relieved from compliance with the above-quoted provision, in that 'on the 4th day of July, 1913, and at all times subsequent to the arrival of said cattle at . . . Yuma—(I say, subsequent to the arrival of said cattle at Yuma), the defendant had full knowledge and notice of the injuries and damages to plaintiff's cattle as set forth in its said complaint; that said cattle were unloaded by the defendant into its stock-pens at the station of Yuma

between the hours of 9 and 10 o'clock A. M., on the 4th day of July, 1913, and between said dates and the hour of 7:30 P. M. of said day, and prior to the reloading of the cattle into defendant's cars, five of said cows died . . . That upon reloading the [158—82] said cattle it became necessary to provide, and the defendant did provide, an additional car in which to ship thirteen of the crippled and sick cattle of the plaintiff to their destination at Phoenix; that at various points between said station of Yuma and the city of Phoenix the train officials in charge of said shipment received telegraphic inquiries from other officials of the defendant inquiring as to the condition and welfare of said shipment; that upon the arrival of said shipment at Phoenix, Arizona, one of said crippled animals remained in defendant's car for a period of more than a week; and that immediately after the unloading of said shipment at Phoenix, Arizona, and almost daily from said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizona Eastern Railroad Company and of this defendant were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the plaintiff's cows which arrived at the destination alive, were such as to render it impossible for the plaintiff or any person else in the exercise of due care and diligence, to determine the amount and extent of damage sustained by the plaintiff within the said ten-day period; that a number of said cattle died many days after their arrival at Phoenix, Arizona, as the result of

such injuries; . . . that the defendant had on many occasions prior to the 21st of October, 1913, recognized plaintiff's right to recover in some amount on account of his damages, sustained as set forth in his said complaint, and has on many occasions attempted to settle and compromise said claim with the plaintiff.' I repeat those allegations of the reply in order to show what the plaintiff claims as his reason or excuse for not having presented his claim in writing to the defendant company or its agents within ten days from [159—83] the date of such loss or injury, as is provided by the contracts. I charge you as a matter of law that if you believe the defendant or its agents or employees did know that five or more of the cattle died while in transit, and also believe that the defedant was negotiating with the plaintiff for a settlement of his claim, and that the defendant knew that the cattle had been injured as alleged in the plaintiff's complaint, then the plaintiff was relieved and released from the giving of such notice of loss or injury within ten days as required by the said provisions of said contracts."

Because it was not shown by the evidence that the defendant ever waived the giving of such notice, and because it is shown by the evidence that plaintiff knew within ten days after receiving the cattle at Phoenix that he had a claim for damages against the defendant, and that he knew or should have known the condition of the cattle at that time, and also on the ground that the defendant did not waive the giving of such notice by the negotiations testified to in the evidence as to a compromise.

The defendant also then and there excepted to that portion of the Court's charge with reference to the clause in the livestock shipping contracts in evidence providing for an agreed valuation of thirty dollars, and particularly in its application to plaintiff's claim of twenty dollars per head, alleged injuries and damages to the eighty-seven head mentioned and referred to in plaintiff's complaint, as follows: "The written contracts introduced in evidence limit the liability of the defendant company to thirty dollars for each animal injured or killed, and if you find for the plaintiff you should assess the damages at not exceeding thirty dollars per head for the cattle killed and not to exceed twenty dollars per head, the amount **[160—84]** claimed in plaintiff's complaint, for the injury caused to each of said cattle by the defendant's negligence. The measure of damages in case of injury to the cattle under the contract is the amount of actual damages to each of said cattle so injured, resulting from the negligence of the defendant, its agents or employees, in no case to exceed twenty dollars per head. The measure of damages as to those that were killed is not exceeding thirty dollars per head. A shipper will not be heard to claim or recover for damages or loss, however great, in excess of the amount claimed in the bill of lading as the agreed value; nor will the carrier be allowed to deny liability for actual damages up to that amount, except, as in this case, where a less amount is claimed in the complaint, which in this case is twenty dollars per head for each of the cattle injured and not killed. The carrier

must respond for negligence up to that value, but no further. If you come to the conclusion that the plaintiff is entitled to recover some damages, then, as I have heretofore stated, the measure of his damages for the eleven head of cattle that died, if you believe they died as a result of the defendant's negligence, would be not exceeding thirty dollars per head, and the measure of damages for the cattle that were injured by reason of the defendant's negligence would be the difference between the market value of the said cattle in their normal condition after making the trip from San Luis Obispo, California, to Phoenix, Arizona, and the condition in which they were actually delivered at Phoenix, but in no event can such injury or damage to each cow be placed at a figure in excess of twenty dollars; in other words, in arriving at the damages, if any, to be awarded to the plaintiff by reason of the cattle injured, if any, through the negligence of the defendant company, the measure of such damages will be **[161—85]** the depreciation in the market value of the cattle by reason of such injury or injuries, such damages in no event, however, to exceed the sum of twenty dollars per head. If you believe that eighty-seven head of the plaintiff's cattle or any lesser number were damaged as set forth in plaintiff's complaint, and as a result of the negligent handling and transportation of the cattle by defendant, you may award the plaintiff damages in a sum not exceeding twenty dollars per head, the amount alleged in plaintiff's complaint, and I further instruct you that in arriving at the

damage suffered by the plaintiff you may consider the market value of cattle in their normal and healthful condition, of the grade and quality of plaintiff's cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and you may then consider the price for which plaintiff sold his cattle in their injured condition, if you find from the evidence that the cattle were injured, and the difference in their market value in their normal condition and their value in their injured condition is a proper measure of plaintiff's damages, as I said before, not exceeding twenty dollars per head for the cattle injured."

Upon the grounds that it was shown by the evidence that the said eighty-seven head of cattle were worth more than thirty dollars per head after having received the alleged injuries and after arrival at destination and because it is not proper to adjust the damages by taking the difference between the market value in their normal condition after arriving in the Salt River Valley and their value in which the cattle were delivered in Phoenix, and because it was provided in the contract that any loss or damage or injury for which the defendant might be liable should be adjusted upon the basis of the market value at the point of shipment, San [162—86] Luis Obispo, California, not exceeding the declared value of thirty dollars per head.

Defendant then and there also excepted to that portion of the Court's charge referring to the nonpayment of the freight charges by plaintiff, as fol-

lows: "Some testimony has been introduced with reference to the failure of the plaintiff to pay the freight charges on the cattle upon the arrival at Phoenix. I do not see how this question or this testimony affects the question as to whether or not the defendant company was guilty of negligence in the manner as alleged in plaintiff's complaint, although this testimony was introduced without objection of counsel; and if you believe that the defendant was negligent, under the definition of that term, in the handling of the cattle, and believe that the plaintiff is entitled to recover, then you will render a verdict for the plaintiff, notwithstanding the fact, if it be a fact, that upon the arrival of the cattle at Phoenix, the plaintiff did not pay the freight before taking possession of the cattle. In other words, gentlemen, I think that is an issue to be tried in another lawsuit and not in the one now being tried."

Upon the ground that the contracts under which the cattle were shipped provided that the plaintiff was not entitled to receive from the railroad company and the railroad company was not bound to deliver to plaintiff any of his cattle without payment of the freight charges. **[163—87]**

Defendant's Exhibit No. 4.

(Copy of livestock shipping order contract and bill of lading executed by Frank R. Stewart, dated San Luis Obispo, July 1, 1913, covering 60 head of the cattle involved in the shipment.) **[164—88]**

Defendant's Exhibit No. 5.

(Being livestock shipping order contract and bill

of lading executed in the name of Frank E. Whitten, dated San Luis Obispo, California, July 1, 1913, which is identical with defendant's Exhibit No, 4, with the exception that it covered 62 head of cattle, shipped in two of the cars involved in this shipment.)

Defendant's Exhibit No. 2.

(Being livestock shipping order contract and bill of lading executed in the name of James Ford, dated San Luis Obispo, California, July 1, 1913; which is identical with defendant's Exhibit No. 4, with the exception that it covered 30 head of cattle shipped in one of the cars involved in this shipment.)

Defendant's Exhibit No. 6 [Night Letter—Frank R. Stewart to R. H. Fields, July 3, 1913].

"Western Union.

"Night Letter.

"Received at

195 GSO. 45 NL.

SP Colton, Cal. July 3, 1913.

R. H. Fields,

37 West Adams St., Phoenix.

Left Los Angeles on two forty-four at five thirty this evening. Expect to reach Yuma at eight in the morning and Maricopa six o'clock tomorrow evening. Will make the run without unloading. Arrange to have us taken up on passenger train tomorrow evening without fail.

FRANK R. STEWART

1227 a. m." **[165—89]**

SOUTHERN PACIFIC COMPANY—PACIFIC SYSTEM

G. W. LUCE, FREIGHT TRAFFIC MANAGER, SAN FRANCISCO, CAL.

J. G. STUBBS, GENERAL FREIGHT AGENT, SOUTHERN DIST.—PACIFIC SYSTEM, LOS ANGELES, CAL.

A. H. RISING, GENERAL FREIGHT AGENT, NORTHERN DIST.—PACIFIC SYSTEM, SAN FRANCISCO, CAL.

LIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING

SPECIAL AGREEMENT

No.....

San Luis Obispo Station July 1 - 1913 191.....

Agent, Southern Pacific Company:

Please forward the following described Live Stock at declared valuation per head hereinafter set forth, and under conditions shown on back hereof, and also subject to the conditions hereinafter more particularly set forth, all of which provisions and conditions have been read by the undersigned and are clearly understood and accepted, and are hereby expressly made a part hereof and agreed to by the undersigned, in consideration of the special rate which is thus attained, and of divers other good and sufficient considerations, receipt whereof is hereby acknowledged.

Frank R Stewart Consignee Phoenix, Ariz Destination

Way-bill No.	CAR Initial	CAR No.
	ML&T	14398
	GH&SA	14673

If consignee fail for any cause to take delivery of this shipment for a period of five days after arrival thereof at destination, or at any other intermediate point in case of accident, the Southern Pacific Company or its Agent is hereby authorized to sell said shipment at public auction to the highest bidder, five days after sending notice to shipper at .....by telegraph, of such intent to sell because of such failure to take delivery, unless within five days after sending said notice consignee or owner pay charges and take delivery thereof.

Number of Head	DESCRIPTION	Declared Value per Head, to be entered by Shipper	
	Horses, Ponies		
	Mules, Jacks		
	Colts (under 1 yr.)		
	Oxen, Bulls, Steers		
60	Cows	$30	00
	Calves		
	Hogs		
	Sheep, Goats		
	Cattle, Range		

If the declared value per head is not declared by the shipper, it is understood and assumed that the value is as printed in specific figures on the reverse side of this contract for Ordinary Live Stock.

Page Witness Frank R Stewart Shipper

AGREEMENT made at the station and on the date above named, by and between **Southern Pacific Company**, hereinafter called first party, and the person whose signature appears above as shipper, hereinafter called second party.

WHEREAS, first party transports live stock under certain rates, rules, and conditions as expressed in General Freight Department Circular G. F. D. No. 188-E, supplements thereto and reissues thereof, and known as "Rules and Regulations Governing the Transportation of Live Stock," and the various classifications and tariffs applying between points under which the service named in this special agreement is to be performed, and in accordance with which the agreement is made and entered into, first party hereby undertaking to transport for second party certain live stock hereinbefore described, at the *rate of $..... per.....'s count, and more particularly described as follows, in so far as concerns car or cars in which contained, and Way-bill numbers.

*If but one animal in shipment, show rate "PER HEAD," if more than one, "PER LOT," except that when carload shipments are made the rate "PER CAR" may be shown.

NOW, THEREFORE, second party for and in consideration of the premises and the rates hereinbefore named, and the service to be performed hereunder, and other good and sufficient considerations (in case of carload shipment carriage of man or men in charge at reduced rate, or free, as rules may provide), hereby agrees to **Load said Live Stock at Point of Shipment, Unload and Reload at Resting Places, and Unload at Destination, and to Feed and Water at his Expense, and to Accompany and Attend Said Live Stock en route and to Destination.** Second party has examined the car or cars into which it is proposed to load such live stock, which is or are numbered and initialed as above, and accepts said car or cars as proper and suitable vehicles for transportation of the property for which this contract is issued, and hereby assumes all risk of loss or damage of or to said live stock or to the persons who may be in charge thereof, or which the animals may occasion themselves or each other, and all loss or damage resulting from heat, suffocation or climatic conditions, overcrowding in cars or steamers, burning of hay, straw or other material placed by shipper or any other person in car or steamer, as the case may be, for feed or other purposes, or which may be sustained by reason of delay incident to ordinary transportation; it being further understood and agreed between the parties hereto that first party does not undertake to forward said shipment of live stock by any particular train or boat, or in time for any particular market. When the transportation of said live stock between the points mentioned in this special agreement is by water, in the steamers of first party, or in case any part of the carriage of said live stock shall involve water transportation, second party, in addition to the foregoing, hereby assumes all risk of loss or damage attending the transfer of said live stock, whether in car or to or from car or steamer, and wharf corrals and steamer, or transfer boat, or from slipping or falling, or from or through breaking of corrals, or breaking of hatch coverings while on said steamer or transport boat, or from accidents or disasters incident to steam navigation, or dangers of the sea of whatsoever nature or kind. And second party hereby specially agrees that in no event is first party or its lessors to be liable for any loss of or damage to said live stock not proven to have been caused by the gross negligence of first party in the performance of or failure to perform some duty which, under the terms of this contract, is due from first party to second party as to said live stock.

It is further understood and agreed by second party that the live stock covered by this special agreement is to be transported subject to the conditions of State, Territorial or Federal laws governing the transportation, unloading and resting of live stock en route; and in case first party should, through its employees, furnish aid to assist in loading, caring for en route, unloading or transferring said live stock, said employees of first party so assisting or performing services shall be subject to the orders and deemed the employees of second party while so engaged, and not in any sense the agents of first party; and when live stock is in corrals at shipping point, resting place or destination, it shall be at owner's risk of loss or damage through breaking out of corrals or in loading and unloading.

Second party hereby further agrees that in case any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by second party on the Freight Claim Agent of first party in writing, within ten days after unloading of the live stock; and that in event of failure so to do, all claims for loss or damage in the premises are hereby expressly waived, released and made void, and it is also expressly agreed by second party that the amount to be by him claimed for each animal as described herein, so lost or damaged, shall be adjusted on basis of value at time and place of shipment, not exceeding the declared value as hereinbefore set forth, and on which declared value the rate or rates of transportation hereinbefore named by first party are based, and in no event is there to be any recovery from first party or its lessors for any loss of or damage to said live stock, from whatsoever cause arising in excess of the declared value hereinbefore set forth.

It is hereby further understood and agreed by second party that in case the live stock herein described be destined to any point off the railroad of first party, or to a point beyond the destination to which rate is named herein, all common carriers engaged in the transportation of said live stock to destination of said live stock shall have and enjoy the special privileges and exemptions herein accorded to first party, when the rate or rates charged by such common carrier or carriers are conditioned on agreement limiting carriers' liabilities; provided, however, that the responsibility of first party, whether as common carrier or otherwise, shall cease and utterly determine upon arrival of said live stock at the station where the said live stock is to leave the road of first party in the course of transportation to destination. Provided, further, that Southern Pacific Company is not to be liable for any loss, damage or delay arising from any act or omission occurring before delivery of shipment to Southern Pacific Company by initial carrier.

First party hereby admits that it has received at the station and on the date first above written, from second party, certain live stock as hereinbefore described, to be transported as aforesaid at the rate or rates, and subject to the rules and conditions hereinbefore and hereinafter referred to; and agrees that said live stock will be delivered as aforesaid unto second party, or order, or assigns, subject to the conditions hereinbefore and hereinafter expressed, on the surrender of this instrument and payment of transportation charges, as agreed.

It is further expressly understood and agreed by second party that the live stock hereinbefore referred to is to be carried by first party subject to all terms and conditions set forth or referred to in the following described documents providing rules and regulations governing the transportation of live stock, and issued by the General Freight Department of first party, namely: (1) Circular G. F. D. 188-E, supplements thereto and reissues thereof, and known as "Rules and Regulations Governing the Transportation of Live Stock;" (2) All circulars at any time thereafter issued by said General Freight Department prior to the issuance of the present contract, in any way affecting the terms and conditions of the circulars above mentioned or any of them, or in any way affecting said rules and regulations for the transportation of live stock.

.....
Shipper.

T. F Delaney
Agent Southern Pacific Company.

188

ORIGINAL

SOUTHERN PACIFIC COMPANY
PACIFIC SYSTEM

LIVE STOCK SHIPPING ORDER CONTRACT AND BILL OF LADING

SPECIAL AGREEMENT

Executed by .....

at .....*Station, Date*.....*191*....

for .....*car*.... *of*.....*good for transportation of*

.....

.....

.....

Billing agent stamp here.

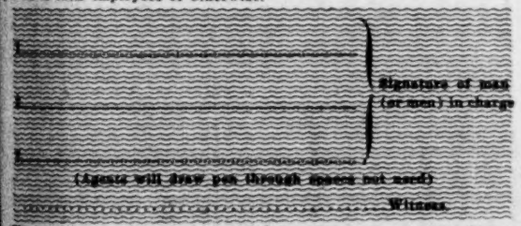
from .....*to* .....

when accompanying the stock herein described and not otherwise.

This Contract *must be presented to Agent at*.....*for renewal*

RELEASE FOR MAN OR MEN IN CHARGE

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract, without charge other than the rate stipulated therein, for the carriage of the live stock mentioned therein, the undersigned in charge do hereby, voluntarily, assume all risk of accident or damage to his (or their) person or property, and do hereby release and discharge the said carrier or carriers from every and all claim, liability and demand of every kind, nature and description, for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise.



The man or men who may be entitled to return transportation free or at a reduced rate under carriers' rules in effect, published and posted as required by law, at time this contract was executed, will upon surrender of this contract to the carriers' agent, receive ticket or tickets for the return journey.

TIME OF LOADING

.....*191*..... *Hour*.....*m.*

Loaded at .....

Time arrived ....., *Hour*.....*m.*

Time depart ....., *Hour*.....*m.*

.....

Name of Consignee

TIME OF ARRIVAL AT.....

(Destination)

.....*191*..... *Hour*.....*m.*

TIME OF UNLOADING

.....*191*..... *Hour*.....*m.*

..... *Agent*

VALUATION

Ordinary Live Stock will be received for transportation under the form of contract appearing upon the other side of this paper, subject to the following additional conditions: Shipments of Live Stock moving between points in Oregon will be received for transportation under the conditions of the "Low Value Live Stock Contract" and "Special Value Live Stock Contract."—(Uniform Live Stock Contract prescribed by the Railroad Commission of Oregon.) Rates as shown in the tariffs of this Company apply only on Ordinary Live Stock, that is, the actual and declared value of which does not exceed:

Each Horse or Pony (Gelding, Mare or Stallion), Mule or Jack	$100.00
Each Colt (under 1 year)	50.00
Each Ox, Bull or Steer	50.00
Each Cow	30.00
Each Calf	10.00
Each Hog	10.00
Each Sheep or Goat	3.00
Range Cattle, each animal	30.00

Values in excess of the foregoing will be considered extraordinary, and such Extraordinary Live Stock will be received and forwarded by this Company only under the form of Contract above mentioned and subject to increased charges as compared with Ordinary Live Stock, as follows:

When actual and declared value exceeds that of Ordinary Live Stock, as shown above, by

100 per cent or less, increase the charge on each	10 per cent
200 per cent or less, increase the charge on each	20 per cent
300 per cent or less, increase the charge on each	30 per cent
400 per cent or less, increase the charge on each	40 per cent
500 per cent or less, increase the charge on each	50 per cent
600 per cent or less, increase the charge on each	60 per cent
700 per cent or less, increase the charge on each	70 per cent
800 per cent or less, increase the charge on each	80 per cent
900 per cent or less, increase the charge on each	90 per cent
1000 per cent or less, increase the charge on each	100 per cent

Charge on animals of greater value in like proportion, but in no case will greater charge be made for other animals than for a horse of same valuation.

INSTRUCTIONS

Shippers or their agents must acquaint themselves with the rules and regulations governing the transportation of Live Stock as per G. F. D. Circular 188-E, supplements thereto and reissues thereof, and known as "Rules and regulations Governing the Transportation of Live Stock," and the terms of said form of contract above mentioned.

ATTENDANTS

Attendants accompanying Live Stock to destination and returning under conditions and rules of this Contract and Bill of Lading, also Circular G. F. D. No. 188-E, supplements thereto and reissues thereof, will be cared for as follows:

With 1 carload of Live Stock 1 man may accompany free, but not return free
With 2 to 5 carloads.....1 man may accompany and return free
With 6 to 10 carloads.....2 men may accompany and return free
With 11 or more carloads.....3 men may accompany and return free

When more than one carload of stock is shipped account of one owner from different stations to one destination, on same train, man or men may accompany as per above, and will be entitled to return free as follows:

One man to the station where the second car was placed in train.

One additional man to the station where the sixth car was placed in train.

One additional man to the station where the eleventh car was placed in train.

Transportation will be furnished to persons in charge of sheep, Hogs, Goats and Calves in DOUBLE-DECK CARS ON BASIS OF TWO SINGLE-DECK CARS as equivalent to one double-deck.

RECEIPT
FOR THE
RETURN TRANSPORTATION
FURNISHED ORIGINAL OR SUBSTITUTED LIVE STOCK ATTENDANTS

Received Ticket, Form.....No.....Date.....

1..... To .....

Signature.....

Slim	O	Light Eyes	O
Medium	O	Dark Eyes	O
Stout	O	Light Hair	O
Short	O	Dark Hair	O
Medium	O	Gray Hair	O
Tall	O	Mustache	O
Young	O	Chin Beard	O
MiddleAge	O	Side Beard	O
Elderly	O	Full Beard	O
		No Beard	O

Received Ticket, Form.....No.....Date.....

2..... To .....

Signature.....

Slim	O	Light Eyes	O
Medium	O	Dark Eyes	O
Stout	O	Light Hair	O
Short	O	Dark Hair	O
Medium	O	Gray Hair	O
Tall	O	Mustache	O
Young	O	Chin Beard	O
MiddleAge	O	Side Beard	O
Elderly	O	Full Beard	O
		No Beard	O

Received Ticket, Form.....No.....Date.....

3..... To .....

Signature.....

Slim	O	Light Eyes	O
Medium	O	Dark Eyes	O
Stout	O	Light Hair	O
Short	O	Dark Hair	O
Medium	O	Gray Hair	O
Tall	O	Mustache	O
Young	O	Chin Beard	O
MiddleAge	O	Side Beard	O
Elderly	O	Full Beard	O
		No Beard	O

SUBSTITUTED ATTENDANT

Received Ticket, Form.....No.....Date.....

..... To .....

Signature.....

Slim	O	Light Eyes	O
Medium	O	Dark Eyes	O
Stout	O	Light Hair	O
Short	O	Dark Hair	O
Medium	O	Gray Hair	O
Tall	O	Mustache	O
Young	O	Chin Beard	O
MiddleAge	O	Side Beard	O
Elderly	O	Full Beard	O
		No Beard	O

SUBSTITUTED ATTENDANT

In case it becomes necessary for one of the persons in charge to leave train en route, substituting another in his place, such substitution must be made in presence of the Agent at station at which it occurs, who will cancel original signature and description and see that those of the substitute are properly affixed.

.....Substitutes .....

At .....

.....Agent

Slim	O	Light Eyes	O
Medium	O	Dark Eyes	O
Stout	O	Light Hair	O
Short	O	Dark Hair	O
Medium	O	Gray Hair	O
Tall	O	Mustache	O
Young	O	Chin Beard	O
MiddleAge	O	Side Beard	O
Elderly	O	Full Beard	O
		No Beard	O

Defendant's Exhibit No. 7 [Portion of Train Sheet, Dated July 4, 1913].

(Being train sheet dated July 4, 1913. For the sake of brevity, abstracted and only that portion of said train sheet as is relevant herein included in this bill of exceptions, as follows:

"Second 244.

Ar	Yuma	11:35	a. m.
L	Yuma	12:40	p. m.
L	Patio	12:50	
L	Dome	1:47	
L	Welton	2:24	
L	Mohawk	3:40	
L	Aztec	4:28	
L	Sentinel	5:55	
L	Piedra	6:05	
Ar	Gila	7:20	
L	Gila	7:50	
L	Estrella	9:44	
Ar	Maricopa	10:45	**[167—90]**

[Order Granting Defendant Sixty Days to Prepare and File Bill of Exceptions, etc.]

In the United States District Court for the District of Arizona.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

MINUTE ENTRY OF ORDER.

Upon stipulation of counsel on both sides herein, it is ordered that the defendant be given sixty days from this date within which to prepare and file its bill of exceptions herein, and that stay of execution be granted to the defendant for the same period. [168—91]

In the United States District Court for the District of Arizona.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

And now, in furtherance of justice and that right may be done, the defendant presents the forgoing as its bill of exceptions in this case and prays that the same may be settled and allowed and signed and certified by the Judge, as provided by law.

Dated this 15th day of December, A. D. 1915.

FRANCIS M. HARTMAN,
J. C. FOREST,
Attorneys for Defendant. [169]

In the United States District Court for the District of Arizona.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Notice of Filing Bill of Exceptions.

To the Above-named Plaintiff, and to P. H. Hayes, Esq., Phoenix, Arizona, His Attorney:

You and each of you will hereby please take notice that the defendant in the above-entitled cause, desiring and intending to prosecute a writ of error from the judgment of the above-entitled court in the above-entitled cause entered on the 29th day of October, 1915, has prepared and this day filed in the office of the clerk of the above-entitled court, for presentation to the Honorable William H. Sawtelle, the Judge who tried the above-entitled case, its bill of exceptions, copy of which is this day served upon you.

Dated this 15th day of December, A. D. 1915.

FRANCIS M. HARTMAN,
J. C. FOREST,
Attorneys for the Defendant.

Service of the above and foregoing notice accepted and also receipt acknowledged for a copy of defendant's bill of exceptions therein referred to this 16th day of December, 1915.

HAYES & LANEY,
Attorneys for Plaintiff. [170]

In the United States District Court for the District of Arizona.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Order Settling Bill of Exceptions.

The foregoing bill of exceptions is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein.

Dated this 3d day of January, A. D. 1916.

WM. H. SAWTELLE,

Judge.

[Endorsements]: No. 142 — Phoenix. In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Bill of Exceptions. Filed Jan. 11, 1916, at —M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. **[171]**

In the United States Circuit Court for the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Assignment of Errors.

Now comes the Southern Pacific ompany, by its attorneys, and says:

That in the record and proceedings herein in the United States District Court for the District of Arizona there is manifest error, to the great prejudice of the Southern Pacific Company, in this, to wit:

1. That the said Court erred in sustaining the objection of counsel for defendant in error, plaintiff below, on the ground that the same was immaterial, to the following question propounded to the witness J. J. Casey, by counsel for plaintiff in error, defendant below: "Q. How do the cattle-pens of the Southern Pacific Company at Yuma compare with the cattle-pens in other places in Arizona and in the southwest that you have seen and observed?"

For the reason that said witness had already testified that he had resided in Arizona for thirty years and had been engaged in the cattle business and farming for twenty-five years; had had experience in shipping cattle into and out of Arizona and over the line of the Southern Pacific Company's railroad through the town of Yuma, and had seen and inspected the cattle-pens of the Southern Pacific Company at Yuma and had seen and inspected the cattle-pens in other places in Arizona and in the southwest used for the purpose of unloading and [172] feeding cattle in the course of transportation by railroad, and because the witness would have testified, if he had been permitted to do so, that the cattle-pens

of the Southern Pacific Company at Yuma, and being the cattle-pens in question in this lawsuit, were just as good and as properly equipped as other pens in Arizona and in the southwest used for unloading and feeding cattle in the course of transportation by railroads, and that the cattle-pens of the Southern Pacific Company at Yuma were properly equipped; and because said testimony was material in view of the allegations of plaintiff's complaint wherein he alleges that the cattle-pens of the said Southern Pacific Company at Yuma were not properly equipped; and for the reason that plaintiff in error, defendant below was not required to maintain at the said town of Yuma cattle-pens equipped any differently or any better than cattle-pens at other places in Arizona and in the southwest similarly situated. **[173]**

2. The Court erred in sustaining the motion made by counsel for defendant in error to strike out the answer made by the witness J. J. Casey, as follows: "Q. State whether or not those pens at El Paso, Texas, have any sheds over them for shade. A. No, sir; they have not."

For the reason that the witness had testified that he had shipped cattle through El Paso, Texas, by railroad; had unloaded cattle into the cattle-pens of the Southern Pacific Company at El Paso, Texas, and had also seen the cattle-pens at El Paso, Texas, of other railroad companies;

For the reason that the testimony was material in view of the issues raised by the pleadings, and in view of the contention of defendant in error that the

cattle-pens of the Southern Pacific Company at Yuma were not properly equipped because they did not have sheds over them. **[174]**

3. Said Court erred in sustaining the objection made by counsel for defendant in error, on the ground that the same was immaterial, to the following question propounded to the witness J. J. Casey by counsel for plaintiff in error: "Q. Please state whether or not the cattle-pens of the Southern Pacific Company at Yuma compared favorably or are practically the same with reference to there being no sheds for shade for the cattle as the cattle-pens of the railroads at Tucson, Bowie and Phoenix, Arizona, El Paso, Texas, and Indio, California, places similarly situated and having the same climatic conditions as Yuma, Arizona?"

For the reason that the witness would have testified in answer to said question, if he had been permitted to do so, and plaintiff in error expected to elicit from the witness in answer to said question that the cattle-pens of the Southern Pacific Company at Yuma compare favorably with and were equipped practically the same as the cattle-pens at the other places named and which were similarly situated and having the same climatic conditions as Yuma, Arizona, and that none of such pens at such other places, so similarly situated, had sheds over them for shade, and that the cattle-pens of the Southern Pacific Company at Yuma were properly equipped; and for the reason that said testimony was material in view of the issues raised by the pleadings,

and in view of the contention by defendant in error that said cattle-pens were not properly equipped because they did *no* have sheds over them for shade. [175]

4. The Court erred in sustaining the objection made by counsel for defendant in error, on the ground that the same was immaterial, to a certain question propounded to the witness, Charles Davis, by plaintiff in error, as follows: "Q. Did you ever see any cattle-pens with sheds over them in this country?"

For the reason that the witness had testified that he had lived in and around Phoenix, Arizona, for all his life, about thirty-eight years, had shipped a great many cattle out of Arizona and into California, and through the town of Yuma; that he was familiar with the cattle-pens of the Southern Pacific Company at Yuma; and for the reason that the witness would have testified in answer to said question, if he had been permitted to do so, and plaintiff in error expected to elicit from said witness, by said question, that he had never seen any cattle-pens with sheds over them in this country; and for the reason that said testimony was material in view of the issues involved in the action and in view of the contention of defendant in error that the cattle-pens of the Southern Pacific Company at Yuma were not properly equipped because they did not have sheds over them. [176]

5. The said Court erred in denying and refusing to grant the motion made by plaintiff in error, de-

fendant below, at the close of the testimony, for a directed verdict in its favor:

For the reason that it was necessary for plaintiff in error to unload the cattle at Yuma, in order to comply with the federal act known as the Twenty-eight Hour Law; and for the reason that plaintiff is basing his claim for damages in this action upon the fact that the cattle were unloaded at Yuma instead of transporting them on to Phoenix, Arizona, their destination.

For the reason that the defendant in error, plaintiff below, abandoned his said cattle at Yuma, upon arrival at that place and refused to have anything further to do with them and refused and neglected to care for said cattle.

For the reason that the evidence also showed that the defendant in error had taken proper care of said cattle at Yuma, Arizona, they would not have suffered any damage or injury.

For the reason that the evidence also showed that all of the alleged loss, injury and damage to said cattle was caused wholly and solely by the gross negligence, fault and want of care of the defendant in error himself.

For the reason that the undisputed evidence showed that if any loss, injury or damage occurred to said cattle the same was due to the fact that plaintiff caused said cattle to be shipped from a cool, moist climate, into an extremely hot and dry climate on the 4th of July, 1913.

For the reason that the undisputed evidence showed that if any loss or damage occurred to said

cattle, the same was due wholly and solely and entirely to the climatic conditions, for which plaintiff in error was not liable or responsible. [177]

For the reason that the undisputed evidence showed that the defendant in error, plaintiff below, knew at the time he shipped the cattle the climatic conditions then existing at Yuma, Arizona, and selected the time for such shipment, and for which plaintiff in error was not liable.

For the reason that the undisputed testimony showed that prior to or at about the time the cattle were shipped from San Luis Obispo, California, defendant in error made and entered into a contract in writing with plaintiff in error, wherein and whereby defendan in error specifically agreed that plaintiff in error should not be liable for any loss, injury or damage to said livestock resulting from heat or climatic conditions.

For the reason that the undisputed evidence showed that if any loss, injury or damage occurred to said cattle, the same was due wholly, solely and entirely to the heat and climatic conditions existing at the time at Yuma, Arizona.

For the reason that the undisputed evidence showed, and it was admitted by defendant in error that at the time of the shipment of said cattle from San Luis Obispo, California, he made and entered into a contract in writing to and with the plaintiff in error, wherein and whereby he specifically agreed and bound himself to load said livestock at point of shipment, unload and reload at resting places and to feed and water the same at his own expense and to

accompany and attend said livestock enroute and to destination; and wherein and whereby defendant in error specifically agreed to attend and care for said livestock during the course of such shipment; and for the reason that the undisputed evidence showed that the defendant in error failed and neglected and refused to attend and care for said cattle at said town of Yuma, the [178] place at which defendant in error is alleging his said cattle were injured and damaged by reason of having been unloaded for feed and rest.

For the reason that the evidence showed, and it was admitted by defendant in error, that he made and entered into a written contract, as above referred to, wherein and whereby, among other things, it was agreed by and between the parties that the plaintiff in error, the railroad company, was not required to deliver said cattle to the defendant in error at destination unless the transportation charges on the same were paid; and for the further reason that it was admitted by the defendant in error that he did not pay the transportation charges.

For the reason that the undisputed evidence showed that there was no negligence whatever on the part of plaintiff in error, defendant below, in the handling and transportation of said cattle.

For the reason that the evidence failed to show any negligence whatsoever on the part of plaintiff in error, defendant below, in the handling and transportation of said cattle. [179]

6. The Court erred in refusing to give the special

charge requested by plaintiff in error, as follows:

"1. If you believe from the evidence that at the time the cattle mentioned in plaintiff's complaint, arrived at Yuma, Arizona, on the line of railroad operated by defendant, they had been confined in the cars approximately nineteen hours, without feed and rest, and that plaintiff did not tender to or file with defendant or any of its agents any written request separate and apart from any printed bill of lading or other railroad form, authorizing defendant to confine said animals in said cars for a period of thirty-six hours from the time they had been loaded into such cars; and that defendant could not or was not reasonably sure of transporting said animals from said town of Yuma, in said cars, to Phoenix, Arizona, the place of destination, without confining said animals in said cars for a longer period than twenty-eight hours, then your verdict should be in favor of the defendant."

For the reason that the undisputed evidence showed that defendant in error did not tender to or file with plaintiff in error or any of its agents any written request, separate and apart from any printed bill of lading or other railroad form, authorizing plaintiff in error to confine said animals in said cars for a period of thirty-six hours from the time they had been loaded into such cars; and for the reason that the evidence showed that the plaintiff in error could not have transported said animals from the said town of Yuma, in said cars, to Phoenix, Arizona, the place of destination, without confining said

animals in the cars for a period longer than twenty-eight hours.

For the reason that the evidence showed that it was necessary for the plaintiff in error to unload said cattle at Yuma in order to comply with the Federal Act known as the Twenty-eight Hour Law. [180]

7. The said Court erred in refusing the special charge requested by plaintiff in error, defendant below, as follows:

"4. If you believe from the evidence that at the time said animals arrived at Yuma, Arizona, they had been confined in the cars approximately nineteen hours without feed or rest, and that it was more humane and better for said cattle to unload them at Yuma for feed and rest than to transport them beyond that point and keep them confined in said cars, then your verdict should be in favor of the defendant."

For the reason that the plaintiff in error introduced evidence at the trial tending to show that it was better for said cattle and more humane to unload them at Yuma for feed and rest than to have transported them beyond that point.

For the reason that one of the issues involved in said action was as to whether or not it was better for said cattle and more humane to unload them at Yuma for feed and rest than to transport them to any other point in said cars. [181]

8. The Court erred in refusing to give the special charge requested by plaintiff in error as follows:

"5. If you believe from the evidence that it was

less injurious to said animals to unload them at Yuma for feed and rest than to have kept them confined in said cars for nine hours or eighteen hours longer, then you should find for the defendant."

For the reason that one of the issues involved in the case was as to whether or not it was less injurious to such animals to unload them at Yuma for feed and rest than to have kept them confined in said cars for nine hours or eighteen hours longer.

For the reason that plaintiff in error, defendant below introduced evidence tending to show that it was less injurious to unload said animals at Yuma for feed and rest than to have kept them confined in said cars for nine or eighteen hours longer. [182]

9, The Court erred in refusing to give special charge requested by plaintiff in error, defendant below, as follows:

"6. If you believe from the evidence that plaintiff made and entered into with defendant the written contracts as pleaded by defendant, providing that in case of any loss or damage should be sustained to said animals in said shipment for which defendant would be liable, that plaintiff should make written demand on defendant within ten days after unloading said animals at destination; and that it was possible for plaintiff to have made such demand within such time, then you are instructed that plaintiff cannot recover for any loss or damage to any of the animals so delivered at destination; but you are further instructed that as to any animals that may have died in transit; or at destination while the same

were still in the possession of the railroad company, plaintiff was not required to give such notice."

For the reason that it was admitted by defendant in error, plaintiff below, that he did make and enter into the contracts as pleaded by plaintiff in error, defendant below, and for the reason that defendant in error, plaintiff below, admitted that he did not make written demand upon plaintiff in error, defendant below, or any of its agents, within the ten days after the unloading of said animals at destination, for any claim for damages for injuries to the 87 head mentioned in plaintiff's complaint; and for the reason that the evidence showed that it was possible for defendant in error to have made such demand within such time, as to said 87 head. **[183]**

10. That said Court erred in refusing to give special charge requested by plaintiff in error as follows:

"7. Defendant has pleaded that the animals mentioned in plaintiff's complaint were transported by it and its connecting carrier under three certain contracts in writing, the execution of which contracts plaintiff has admitted.

"These contracts provide, among other things, that in case any loss or damage resulting to said animals in transporting same, for which defendant would be liable, the plaintiff would within ten days after unloading at destination, make written demand upon defendant therefor, and that in the event of failure to make such written demand within such time that all claims for such loss or damage were expressly waived and made void.

"You are instructed that such a provision is reasonable and that if it were possible for plaintiff to have given such notice within such time and he did not do so, then you are instructed that plaintiff cannot recover of defendant for any loss or damage to any of the animals delivered to him at destination; but that said provision as to such notice does not apply to any animals that may have died in transit or at destination before being taken away from unloading pens at destination."

For the reason that the evidence showed that it was entirely possible for defendant in error to have given the notice referred to within the time mentioned in said contracts as to the 87 head for which defendant in error is claiming damages by reason of the alleged injuries. [184]

11. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

"8. If you believe from the evidence that any of the animals mentioned in plaintiff's complaint died within ten days after unloading at destination, and that plaintiff did not make written demand upon defendant or any of its agents within ten days after such unloading for loss or damage to such animals, then you are instructed that plaintiff cannot recover anything for such animals."

For the reason that plaintiff below, defendant in error, admitted that he made and entered into the contracts above mentioned and also admitted that he made no written claim upon plaintiff in error, or any of its agents, within ten days after the delivery of

said cattle at destination, and for the reason that if any of said cattle died within ten days after delivery the plaintiff below, defendant in error, by not making any such claim within such time, thereby waived any and all claims therefore as to such animals. [185]

12. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

"9. If you believe from the evidence that plaintiff knew, or could have known by the exercise of reasonable diligence, within ten days after unloading said animals at destination, that eight-seven head of said animals were injured or damaged in the sum of twenty dollars per head, as alleged by plaintiff, and plaintiff did not, within ten days after unloading said animals at destination, make written demand upon defendant or any of its agents for such alleged loss or damage, then you are instructed that plaintiff cannot recover for such alleged loss or damage."

For the reason that the testimony of plaintiff himself shows that he knew within ten days after unloading said animals at destination that he had an alleged claim for the *eight-seven* head of animals referred to, that he refused to pay the freight charges at destination, giving as a reason therefor, his alleged claim, and the evidence also shows that he knew or could have known by the exercise of reasonable diligence, within ten days after the unloading of said animals at destination, whether or not he had a claim for damages to said eighty-seven head; and for the reason that the question as to whether or not defend-

ant in error knew or could have known by the exercise of reasonable diligence within ten days after the unloading of said animals at destination, whether or not he had a claim for damages to the eighty-seven head was one of the issues involved in said case and should have been submitted to the jury. [186]

13. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

"10. If you believe from the evidence that plaintiff could, within ten days after unloading said animals at destination, have given written notice to defendant or any of its agents, of any of the loss or damage to any of the animals, for which plaintiff is seeking to recover, and that he did not give such notice within such time, then you are instructed that plaintiff cannot recover for any of the alleged loss or damage to said animals, for which he could have given such notice, but you are further instructed that plaintiff was not required to give such notice as to any animals that may have died in transit or at destination before being removed from unloading pens."

For the reason that the undisputed testimony and the testimony of the defendant in error himself showed that he could have given written notice within ten days after unloading said animals at destination, to plaintiff in error or to some of its agents, of his alleged claim for damages to the eighty-seven head mentioned in the complaint, and for the reason that this was one of the issues of fact involved in the case and should have been submitted to the jury. [187]

14. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

"11. If you believe from the evidence that plaintiff, at the time said animals were delivered by him to defendant, at San Luis Obispo, California, for transportation by defendant, over its line of railroad and the line of railroad of its connecting carrier to Phoenix, Arizona, made and entered into the contract or contracts in writing, as set forth and pleaded by defendant, wherein and whereby it was agreed and stipulated by and between plaintiff and defendant that the agreed valuation of said animals was the sum of thirty dollars per head; and that plaintiff, by reason of said stipulation that the value of said animals was the said sum of thirty dollars per head, thereby obtained lower and cheaper freight rates for the transportation of said animals from San Luis Obispo, California, to Phoenix, Arizona, than would have been applicable to or assessed upon said shipment had a higher valuation been placed upon said animals; and that plaintiff by said contracts stipulated and agreed that in case any loss or damage should be sustained to said animals for which defendant would be liable, that the amount to be claimed by plaintiff for each of said animals, so lost or damaged should be adjusted on the basis of the value of such animals at the time and place of said shipment, to wit, on July 1st, 1913, at San Luis Obispo, California; not exceeding the declared and agreed value thereof, to wit, the sum of thirty dollars per head; and you further find that the loss

and damage to plaintiff's said animals, as alleged, was caused by the negligence of defendant as alleged by plaintiff, to wit, the unloading of said animals at Yuma, Arizona; then you are instructed that plaintiff cannot in any event, recover herein, any greater sum for the animals that died in transit [188] or before being removed from pens at destination, than the said sum of thirty dollars per head and the freight charges on same; and you are further instructed that plaintiff's claim for the animals alleged to have been injured in such transportation should be adjusted on a basis of said declared and agreed valuation of thirty dollars per head and the freight charges on same from San Luis Obispo, California, to Phoenix, Arizona; and that if said animals after delivery at destination to plaintiff were of the value of thirty dollars per head, and the freight charges on same from San Luis Obispo, California, to Phoenix, Arizona, plaintiff is not entitled to recover anything for any of said animals alleged to have been injured."

For the reason that it was shown by the undisputed evidence and by the admissions of defendant in error that the contracts were made and entered into as set forth in said requested instruction; that defendant in error thereby obtained a cheaper freight rate for the transportation of said animals than would have been applicable to or assessed upon said shipment had a higher valuation been placed upon said animals; that defendant in error agreed that in case any loss or damage be sustained to said animals for which plaintiff in error would be liable that the amount to be claimed by defendant in error

for each of said animals so lost or damaged should be adjusted on the basis of the value of such animals at the time and place of shipment, to wit, on July 1st, 1913, at San Luis Obispo, California, not exceeding the declared and agreed value thereof, to wit, the sum of thirty dollars per head: that the eighty-seven head for which defendant in error was claiming injuries or damages in the sum of twenty dollars per head were worth, after having received said alleged injuries, the sum of sixty-five [189] dollars per head, and were sold for the said sum of sixty-five dollars per head, and that defendant in error did not pay any freight charges on said animals for their transportation from San Luis Obispo, California, to Phoenix, Arizona.

And for the reason that under the law the defendant was not entitled to recover anything for the alleges injuries to the *eight-seven* head sued for if said eighty-seven head were worth sixty-five dollars per head after arrival at destination and after receiving said alleged injuries.

And for the reason that under the law defendant in error was not entitled to recover anything on account of the alleged injuries or damages to the eighty-seven head sued for if said animals were worth more than thirty dollars per head after arriving at destination and after receiving said alleged injuries.

For the reason that said requested instruction embodied the correct interpretation or construction of the livestock shipping contracts in evidence as to the adjustment of claims for damages for injuries to the

animals involved in said shipment. [190]

15. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

"15. If you believe from the evidence that the alleged loss and damage to plaintiff's animals was due to any other cause than unloading them at Yuma, Arizona, then you are instructed that plaintiff cannot recover and your verdict should be in favor of the defendant."

For the reason that plaintiff in error offered evidence tending to prove that said animals were poor and weak and in starved condition when shipped from San Luis Obispo, California, and for the reason that it was also shown by the undisputed evidence that any injury or damage suffered by said animals was caused by the heat and climatic condition and this question should have been submitted to the jury. [191]

16. The Court erred in refusing to give special instruction requested by plaintiff in error, as follows:

"16. If you believe that at the time plaintiff shipped his said animals from San Luis Obispo, California, they were in a poor, weak or starved condition, and that any of the loss or damage to said animals, as alleged by plaintiff, was due to the condition of said animals at the time they were so shipped then you are instructed that plaintiff cannot recover herein of defendant, for such loss or damage."

For the reason that evidence was offered by plaintiff in error and admitted tending to prove that the said animals at the time they were shipped from San

Luis Obispo, California, were in a poor, weak and starved condition, and that one of said animals fell down on the way to the loading-pens at said place, and had to be helped into the cars, and said question should have been submitted to the jury. [192]

17. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

"17. If you believe from the evidence that plaintiff caused said cattle to be brought from a cool and moist climate into Arizona in July, and into an extremely hot and dry climate, and that plaintiff knew of the climatic conditions then existing in Arizona, and the place or places to which he caused said animals to be transported; and any of the alleged loss or damage to said animals was due to such climatic conditions, then you are instructed that plaintiff cannot recover of defendant for such loss or damage."

For the reason that it was shown by the undisputed evidence and by the testimony of defendant in error himself that said animals were brought from a cool and moist climate into Arizona, in July, into an extremely hot and dry climate, and that defendant in error knew of the climatic condition then existing in Arizona, and at Yuma, and that he selected the time for transporting said animals; and for the further reason that the undisputed evidence showed that some if not all of the alleged loss, injury or damage was caused by such climatic conditions, and for the reason that said question should have been submitted to the jury. [193]

18. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

"18. You are instructed that if plaintiff failed or neglected to attend to unloading and loading his cattle at Yuma, or failed or neglected to properly care for his said cattle while they were at Yuma, and that any of the alleged loss or damage was due to such failure on the part of plaintiff to attend to and care for said cattle, that defendant is not liable therefor, and plaintiff cannot recover for any such loss or damage."

For the reason that defendant in error (plaintiff below) by the livestock shipping contract made and entered into by and between him and plaintiff in error, absolutely agreed and bound himself to unload and reload said animals at resting places, and to feed and water said animals at his expense, and to accompany and attend and care for said animals en route and to destination.

And for the reason that the undisputed evidence showed, and which was admitted by defendant in error, that he (defendant in error) failed, neglected and refused to assist in unloading said cattle at Yuma, and failed, neglected and refused to attend to and care for said animals at Yuma, and abandoned the same.

And for the further reason that it was admitted by defendant in error's own witness, who was one of the caretakers of said animals accompanying said shipment for defendant in error, that if defendant in error had properly attended to said animals while at Yuma, and properly taken care of the same,

that none of said animals would have died.

And for the reason that it was shown by the undisputed evidence and by the admissions of defendant in error and of [194] *and of* his own witnesses and caretakers that at least some of the injury or damage was due to the failure and negligence of defendant in error to properly care for and attend to said animals at Yuma.

And for the further reason that said question should have been submitted to the jury. [195]

19. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

"19. You are instructed that plaintiff cannot recover of defendant for any loss or damage to his cattle resulting from heat or climatic conditions, and if you believe that the alleged loss or damage to plaintiff's cattle was due to the heat at Yuma, or to the climatic conditions at that place, then your verdict should be in favor of the defendant."

For the reason that the contracts in evidence specifically provided that defendant in error assumed all risk of loss or damage to said livestock, resulting from heat, or climatic conditions; that there was a sufficient consideration for such agreement; and for the reason that the undisputed evidence showed that the alleged loss and damage was due solely and entirely to the heat at Yuma and the climatic conditions at that place.

And for the reason that the undisputed evidence showed that plaintiff in error had nothing whatever to do with choosing the time of transporting said cattle, but that defendant in error himself selected

the time for such transportation; that defendant in error knew before he shipped said cattle of the climatic conditions then existing at Yuma, and in Arizona; that the weather and climatic conditions at that time at Yuma were extremely hot and dry; and that it would be injurious to said animals to ship them from a moist and cool climate, as then existed in and around San Luis Obispo, California, into Arizona and through Yuma, where there existed such an extremely hot and dry climate. [196]

20. The Court erred in refusing to give special charge requested by plaintiff in error, as follows:

"20. You are instructed that plaintiff cannot recover anything from defendant in this action on account of the alleged injuries and damage to the eighty-seven head of cattle mentioned in plaintiff's complaint."

For the reason that by the contracts in evidence it was provided that in case any loss, injury or damage should be sustained by said animals for which plaintiff in error would be liable that defendant in error should make written demand therefor upon plaintiff in error within ten days after unloading said animals at destination; and in the event of failure to give such notice within such time that all claims for loss or damage were expressly waived, released and made void.

And for the further reason that defendant in error admitted and it was shown by the undisputed evidence that no such notice was given within the time mentioned.

And for the reason that the evidence also showed

that it was entirely possible for defendant in error to have given such notice within the time.

And for the further reason that the contracts in evidence expressly provided that in the event any of said animals sustained any loss or damage for which plaintiff in error was liable that the amount to be claimed for each animal so lost or damaged should be adjusted on the basis of value at the time and place of shipment, to wit, July 1, 1913, at San Luis Obispo, California, not exceeding the declared and agreed value of thirty dollars per head, and that in no event would there be any recovery for any loss or damage to said livestock, from whatsoever cause arising in excess of the declared and agreed value of thirty dollars per head. [197]

And for the reason that the undisputed evidence showed and it was also admitted by defendant in error that all of the said eighty-seven head mentioned in the complaint and for which defendant in error was claiming twenty dollars per head for alleged injuries, were worth more than thirty dollars per head after arrival at destination and after having received said alleged injuries, to wit, that they were worth sixty-five dollars per head, and were sold by defendant in error after arrival at destination and after having received said alleged injuries for sixty-five dollars per head. [198]

21. The Court erred in giving the special charge requested by defendant in error, as follows:

"6. If you believe that eighty-seven head of plaintiff's cattle or any lesser number were damaged as set forth in plaintiff's complaint and as a result

of the negligent handling and transportation of his cattle by the defendant, you may award the plaintiff damages in a sum not exceeding twenty dollars per head, the amount alleged in plaintiff's complaint, and I further instruct you that in arriving at the damage suffered by plaintiff, you may consider the market value of cattle in their normal and healthful condition, of the grade and quality of plaintiff's cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and you may then consider the price for which plaintiff sold his cattle in their injured condition if you find from the evidence the cattle were injured, and the difference in their market value in their normal condition and their value in their injured condition, is a proper measure of plaintiff's damages."

For the reason that by the contracts in evidence it was provided that in case any loss, injury or damages should be sustained by said animals for which plaintiff in error would be liable that defendant in error should make written demand therefor upon plaintiff in error within ten days after unloading said animals at destination; and in the event of failure to give such notice within such time that all claims for loss or damage were expressly waived, released and made void.

And for the further reason that defendant in error admitted and it was shown by the undisputed evidence that no such notice was given within the time mentioned.

And for the reason that the evidence also showed that it was entirely possible for defendant in error

to have given [199] such notice within the time.

And for the further reason that the contracts in evidence expressly provided that in the event of any of said animals sustaining any loss or damage for which plaintiff in error was liable that the amount to be claimed for each animal so lost or damaged would be adjusted on the basis of value at the time and place of shipment, to wit, July 1, 1913, at San Luis Obispo, California, not exceeding the declared and agreed value of thirty dollars per head, and that in no event should there be any recovery for any loss or damage to said livestock, from whatsoever cause arising in excess of the declared and agreed value of thirty dollars per head.

And for the further reason that the undisputed evidence showed and it was also admitted by defendant in error that all of the said eighty-seven head mentioned in the complaint and for which defendant in error was claiming twenty dollars per head for alleged injuries, were worth more than thirty dollars per head after arrival at destination and after having received said alleged injuries, to wit, that they were worth sixty-five dollars per head, and were sold by defendant in error after arrival at destination and after having received said alleged injuries for sixty-five dollars per head. [200]

22. The Court erred in giving the special charge requested by defendant in error, as follows:

"8. If you find from the evidence that the defendant had other corrals on its line of road and in the direction in which plaintiff's shipment was moving, into which plaintiff's cattle could have been unloaded

within the twenty-eight hour period and in a more humane manner than by unloading them at Yuma under the circumstances developed in this case, then it was the defendant's positive duty to transport said cattle to such station for unloading."

For the reason that the evidence showed that at the time the cattle arrived at Yuma they had been confined in the cars, without feed, water or rest for eighteen hours and fifty-five minutes; that they had been shipped from Los Angeles, California, to Yuma, Arizona, through a hot, dry, dusty, desert country; that the train carrying said cattle would necessarily have had to remain at Yuma, in the yard at that place, for the purpose of inspection, changing engines, changing crews, etc., for at least one hour before it could have departed from Yuma; that said train did actually remain at Yuma for one hour and fifteen minutes; that the next station on the line of plaintiff in error at which there were any cattle-pens for unloading for feed and rest was Gila, a distance of 123 miles; that the schedule time of such a train, had the five cars of cattle remained in it, from Yuma to Gila was ten hours; that it would have taken said train ten hours to have made the run from Yuma to Gila if said five cars of cattle had remained in said train, which would have necessitated said cattle remaining in said cars, without feed, rest or water, for approximately thirty hours, and for a longer period than twenty-eight hours.

For the reason that the evidence showed that it was better [201] for the cattle and more humane to unload at Yuma than to have transported

them on any further.

For the reason that the evidence showed that plaintiff in error did not have other corrals or cattle pens on its line of road, in the direction in which the shipment was moving, into which said cattle could have been unloaded, which could have been reached by said train within twenty-eight hours from the time the cattle had been loaded in Los Angeles, California.

For the reason that the undisputed evidence showed and defendant in error admitted that he (defendant in error) abandoned said cattle at Yuma, and failed, neglected, and refused to attend to or care for them, and for the reason that it was the duty of defendant in error under the contracts in evidence to attend to and care for said cattle en route to destination." [202—31]

The Court erred in charging the jury in the general charge, as follows: "In this same connection you may also determine whether or not there was on said 4th day of July, 1913, any other place or station on defendant's line which the train carrying these cattle, and operating on its schedule, could have reached within the twenty-eight hour period, at which the cattle could have been unloaded, fed, watered and rested, under conditions more favorable than existed at said town of Yuma on July 4, 1913. If you find from the evidence that the defendant had other corrals on its line of road and in the direction in which plaintiff's shipment was moving, into which plaintiff's cattle could have been unloaded within the twenty-eight hour period and in a more

humane manner than by unloading at Yuma under the circumstances developed in this case, then it was the defendant's positive duty to transport said cattle to such station for unloading."

For the reason that the evidence showed that at the time the cattle arrived at Yuma they had been confined in the cars, without feed, water or rest for eighteen hours and fifty-five minutes; that they had been shipped from Los Angeles, California, to Yuma, Arizona, through a hot, dry, dusty, desert country; that the train carrying said cattle would necessarily have had to remain at Yuma, in the yard at that place, for the purpose of inspection, changing engines, changing crews, etc., for at least one hour before it could have departed from Yuma; that said train did actually remain at Yuma for one hour and fifteen minutes; that the next station on the line of plaintiff in error at which there were any cattle-pens for unloading for feed and rest was Gila, a distance of 123 miles; that the schedule time of such a train, had the five cars of cattle remained in it, from Yuma to Gila was ten hours; that it would [203] have taken said train ten hours to have made the run from Yuma to Gila if said five cars of cattle had remained in said train, which would have necessitated said cattle remaining in said cars, without feed, rest or water, for approximately thirty hours, and for a longer period than twenty-eight hours.

For the reason that the evidence showed that it was better for the cattle and more humane to unload at Yuma than to have transported them any further.

For the reason that the evidence showed that plain-

tiff in error did not have other corrals or cattle-pens on its line of road, in the direction in which the shipment was moving, into which said cattle could have been unloaded, which could have been reached by said train within twenty-eight hours from the time the cattle had been loaded in Los Angeles, California.

For the reason that the undisputed evidence showed and defendant in error admitted that he (defendant in error) abandoned said cattle at Yuma, and failed, neglected and refused to attend to or care for them, and for the reason that it was the duty of defendant in error under the contracts in evidence to attend to and care for said cattle en route to destination. **[204]**

24. The Court erred in charging the jury in the general charge, as follows: "The defendant company also pleads that notwithstanding the fact that it may have been guilty of negligence in the particulars set out in the complaint, nevertheless the plaintiff in this case cannot recover, because the contract heretofore referred to (and which was signed by the plaintiff, and by Mr. Ford, and Mr. Whitton, on behalf of the plaintiff, who were thereunto duly authorized) provides that the 'second party thereby further agrees that in case of any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by the second party on the freight claim agent of the first party in writing within ten days after unloading of the livestock; and that in event of failure so to do, all claims for loss or damages in the premises are hereby expressly waived, released and

made void.' Defendant alleges that no claim for loss or injury to said cattle was presented to it, or any of its agents or employees within the ten-day period. If you find this to be true, then, of course, the plaintiff cannot recover unless you further find that the defendant waived this provision of the contract, *of* that the plaintiff was relieved from a compliance therewith as is hereinafter stated. The plaintiff, in reply to this contention that the claim should have been presented in writing within ten days after the unloading of the livestock, alleges that he was relieved from compliance with the above-quoted provision in that 'on the 4th day of July, 1913, and at all times subsequent to the arrival of said cattle at . . . Yuma—(I say, subsequent to the arrival at Yuma)—the defendant had full knowledge and notice of the injuries and damages to plaintiff's cattle as set forth in its said complaint; that said cattle were unloaded by the defendant [205] into its stock-pens at the station of Yuma between the hours of 9 and 10 o'clock A. M. on the 4th day of July, 1913, and between said dates and the hour of 7:30 P. M. of said day, and prior to the reloading of the cattle into defendant's cars, five of said cows died. . . . That upon reloading the said cattle it became necessary to provide, and the defendant did provide, an additional car in which to ship thirteen of the crippled and sick cattle of the plaintiff to their destination at Phoenix; that at various points between said station of Yuma and the city of Phoenix the train officials in charge of said shipment received telegraphic inquiries from other offi-

cials of the defendant inquiring as to the condition and welfare of said shipment; that upon the arrival of said shipment at Phoenix, Arizona, one of said crippled animals remained in defendant's car for a period of more than a week; and that immediately after the unloading of said shipment at Phoenix, Arizona, and almost daily from said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizona Eastern Railroad Company and of this defendant were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the plaintiff's cows which arrived at the destination alive, were such as to render it impossible for the plaintiff, or any other person else in the exercise of due care and diligence, to determine the amount and extent of damage sustained by the plaintiff within the said ten-day period; that a number of said cattle died many days after their arrival at Phoenix, Arizona, as the result of such injuries. . . . That the defendant had on many occasions prior to the 21st day of October, 1913, recognized plaintiff's right to recover in some amount on account of his damages, sustained as set forth in his said complaint, [208] and has on many occasions attempted to settle and compromise said claim with the plaintiff.' I repeat those allegations of the reply in order to show what the plaintiff claims as his reason or excuse for not having presented his claim in writing to the defendant company or its agents within ten days from the date of such loss or injury, as is provided by the contracts.

"I charge you as master of law that if you believe the defendant or its agents or employees did know that five or more of the cattle died while in transit, and also believe that the defendant was negotiating with the plaintiff for a settlement of his claim, and that the defendant knew that the cattle had been injured as alleged in the plaintiff's complaint, then the plaintiff was relieved and released from the giving of such notice of loss or injury within ten days as required by the said provision of said contracts."

For the reason that the evidence showed that plaintiff in error had never waived the giving of such notice; that the defendant in error was not relieved from giving such notice; that it was entirely possible for defendant in error to have given the notice as to his alleged claim for damages to the eighty-seven head mentioned in the complaint within the ten days.

For the reason that defendant in error admitted he knew within the ten days that he had an alleged claim for damages as to said eighty-seven head, and that he knew or should have known within the ten days the condition of the cattle.

And for the reason that any negotiations that defendant in error may have had with plaintiff in error with reference to compromise or settlement did not constitute a waiver on the part of plaintiff in error of the provision in said contracts requiring written claim for loss or damage to be made within ten days after the animals were unloaded at destination. [207]

25. The Court erred in charging the jury in the general charge, as follows: "The written contracts

introduced in evidence limit the liability of the defendant company to thirty dollars for each animal injured or killed, and if you find for the plaintiff you should assess the damages at not exceeding thirty dollars per head for the cattle killed and not to exceed twenty dollars per head, the amount claimed in plaintiff's complaint, for the injury caused to each of said cattle by the defendant's negligence. The measure of damages in case of injury to the cattle under the contract is the amount of actual damages to each of said cattle so injured, resulting from the negligence of the defendant, its agents or employes, in no case to exceed twenty dollars per head. The measure of damages as to those that were killed is not exceeding thirty dollars per head. A shipper will not be heard to claim or recover for damages or loss, however great, in excess of the amount claimed in the bill of lading as the agreed value; nor will the carrier be allowed to deny liability for actual damages up to that amount, except, as in this case, where a less amount is claimed in the complaint, which in this case is twenty dollars per head for each of the cattle injured and not killed. The carrier must respond for negligence up to that value but no further. If you come to the conclusion that the plaintiff is entitled to recover some damages, then, as I have heretofore stated, the measure of his damages for the eleven head of cattle that died, if you believe they died as a result of the defendant's negligence, would be not exceeding thirty dollars per head, and the measure of damages for the cattle that were injured by reason of the defendant's negligence would be the

difference between the market value of the said cattle in their normal condition after making the trip from San [208] Luis Obispo, California, to Phoenix, Arizona, and the condition in which they were actually delivered at Phoenix, but in no event can such injury or damages to each cow be placed at a figure in excess of twenty dollars; in other words, in arriving at the damages, if any, to be awarded to the plaintiff by reason of the cattle injured, if any, through the negligence of the defendant company, the measure of such damages will be the depreciation in the market value of the cattle by reason of such injury or injuries, such damages in no event, however, to exceed the sum of twenty dollars per head. If you believe that eighty-seven head of the plaintiff's cattle or any lesser number were damaged as set forth in plaintiff's complaint, and as a result of the negligent handling and transportation of the cattle by defendant, you may award the plaintiff damages in a sum not exceeding twenty dollars per head, the amount alleged in plaintiff's complaint, and I further instruct you that in arriving at the damage suffered by the plaintiff you may consider the market value of the cattle in their normal and healthful condition, of the grade and quality of plaintiff's cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and you may then consider the price for which plaintiff sold his cattle in their injured condition, if you find from the evdence that the cattle were injured, and the difference in their market value in their normal condition and their value in their injured condition is a proper measure

of plaintiff's damages, as I said before, not exceeding twenty dollars per head for the cattle injured."

For reason that the contracts in evidence and referred to expressly provided that in the event any of said animals sustained any loss or damage for which plaintiff in error was liable that the amount to be claimed for each animal so lost [209] or damaged should be adjusted on the basis of value at the time and place of shipment, to wit, July 1, 1913, at San Luis Obispo, California, not exceeding the declared and agreed value of thirty dollars per head, and that in no event should there be any recovery for any loss or damage to said live stock from whatever cause arising in excess of the declared and agreed value of thirty dollars per head.

And for the reason that the undisputed evidence showed and it was admitted by defendant in error that all of the said eighty-seven head mentioned in the complaint and for which defendant in error was claiming twenty dollars per head for alleged injuries, were worth more than thirty dollars per head after arrival at destination, and after having received said alleged injuries, to wit, that they were worth sixty-five dollars per head and were sold by defendant in error after arrival at destination and after having received said alleged injuries for sixty-five dollars per head.

And for the reason that it was not proper to adjust the alleged damages by taking the difference between the market value, or what would have been their market value in their normal condition, and their

value in the condition in which the cattle were delivered at destination.

For the reason that said charge placed an erroneous construction and interpretation upon the terms of said contracts in the particulars above pointed out. [210]

26. The Court erred in charging the jury as follows: "Some testimony has been introduced with reference to the failure of the plaintiff to pay the freight charges on the cattle upon the arrival at Phoenix. I do not see how this question or this testimony affects the question as to whether or not the defendant company was guilty of negligence in the manner as alleged in plaintiff's complaint, although this testimony was introduced without objection of counsel; and if you believe that the defendant was negligent, under the definition of that term, in the handling of the cattle, and believe that the plaintiff is entitled to recover, then you will render a verdict for the plaintiff, notwithstanding the fact, if it be a fact, that upon the arrival of the cattle at Phoenix, the plaintiff did not pay the freight before taking possession of the cattle. In other words, gentlemen, I think that is an issue to be tried out in another lawsuit and not in the one now being tried."

For the reason that the contracts in evidence, under which the cattle were shipped, expressly provided that defendant in error was not entitled to receive from the carrier and the carrier was not bound to deliver to defendant in error any of said cattle without payment of the freight charges. [211]

WHEREFORE, by reason of the errors aforesaid,

the said Southern Pacific Company prays that the judgment rendered and entered in this action be avoided, annulled and reversed and that the said District Court of the United States for the District of Arizona be directed to grant a new trial of said cause.

FRANCIS M. HARTMAN,
J. C. FOREST,
Attorneys for Plaintiff in Error, Defendant in the Court Below.

[Endorsements]: No. 142 (Phx.) In the United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Plaintiff in Error, vs. Frank R. Stewart, Defendant in Error. Assignment of Errors. Filed Dec. 18, 1915. George W. Lewis, Clerk. [212]

In the United States District Court for the District of Arizona.

FRANK R. STEWART,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

To the Honorable WILLIAM H. SAWTELLE, Judge of the District Court Aforesaid:

Now comes the Southern Pacific Company, by its attorneys, and respectfully represents: That this action is brought by plaintiff to recover of defendant damages in the sum of three thousand six hundred

ninety-five dollars, for alleged loss and injury to a certain shipment of cattle made by plaintiff, on or about the 1st day of July, 1913, from the town of San Luis Obispo, California, over the line of railroad operated by the said Southern Pacific Company, the defendant, and over its connecting carriers, to the city of Phoenix, in the State of Arizona:

That on the 26th day of October, 1915, said cause came on for trial before the above-entitled court and jury duly empanelled:

That thereafter and on the 29th day of October, 1915, the said jury found a verdict against your petitioner and in favor of said Frank R. Stewart, plaintiff, for the sum of two thousand and ninety dollars, and upon said verdict a final judgment was entered on the said 29th day of October, A. D. 1915, against your petitioner, defendant in said action, and your petitioner feeling itself aggrieved by the said verdict and judgment [213] entered thereon as aforesaid, therefore petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of the United States for the Ninth Circuit, under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue, that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at the city of San Francisco, in said Circuit, for the correction of errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by plaintiff in error, conditioned as the

law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

FRANCIS M. HARTMAN,
J. C. FOREST,
Attorneys for Defendant.

Allowed this —— day of December, A. D. 1915.

_____,
Judge.

[Endorsements]: No. 142—Phoenix. In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Petition for Writ of Error. Filed Dec. 18, 1915, George W. Lewis, Clerk. [214]

[Order Allowing Writ of Error Fixing Amount of Supersedeas Bond.]

In the United States District Court for the District of Arizona.

FRANK R. STEWART,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Upon motion of Francis M. Hartman and J. C. Forest, Esquires, attorneys for defendant, and upon filing a petition for a writ of error and assignment of errors,

IT IS ORDERED that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein and that the amount of the supersedeas bond on said writ of error be and it hereby is fixed at three thousand ($3,000) dollars and upon the filing of such bond and approval thereof by the Judge of this court that all further proceedings herein be suspended until the determination of said writ of error by said Circuit Court of Appeals.

Dated this 18th day of December, A. D. 1915.

WM. H. SAWTELLE,
Judge.

[Endorsements]: No. 142—Phoenix. In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Order Allowing Writ of Error and Fixing Bond. Filed Dec. 18, 1915, George W. Lewis, Clerk. [215]

In the United States District Court for the District of Arizona.

No. 142—PHOENIX.

FRANK R. STEWART,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: that we, Southern Pacific Company, a corporation, as principal, and Albert Steinfeld and Epes Randolph of the county of Pima, State of Arizona and district aforesaid, as sureties, are held and firmly bound unto Frank R. Stewart, in the full and just sum of three thousand dollars ($3,000), to be paid to the said Frank R. Stewart, his administrators, executors or assigns, for the payment of which, well and truly to be made, we bind ourselves, our successors, assigns, executors and administrators, jointly and severally by these presents.

Signed and dated this 17th day of December, A. D. 1915.

WHEREAS, lately, at a regular term of the District Court of the United States for the District of Arizona, sitting at Phoenix, in said district, in a suit pending in said court between Frank R. Stewart, as plaintiff, and the Southern Pacific Company, a Corporation, as defendant, cause No. 142 on the law docket of said court, final judgment was rendered against said Southern Pacific Company, a corporation, for the sum of two thousand ninety dollars ($2,090), with interest thereon at the rate of six per cent per annum from date thereof until paid; and the said Southern Pacific Company, a corporation, has obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment of said court in the said suit and a citation directed to said Frank

R. Stewart, [216] defendant in error, citing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California according to law, within thirty (30) days from the date hereof:

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said Southern Pacific Company, a corporation, shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

SOUTHERN PACIFIC COMPANY.
By T. H. WILLIAMS,
Its Superintendent.
ALBERT STEINFELD,
EPES RANDOLPH.

State of Arizona,
County of Pima,—ss.

Albert Steinfeld and Epes Randolph, being first duly sworn, each for himself and not one for the other deposes and says: That he is a resident and householder within the county of Pima, State of Arizona, and within the district aforesaid: That he is worth the sum of three thousand dollars, the amount specified in the foregoing bond, over and above all just debt and liabilities and exclusive of property exempt from execution and forced sale.

ALBERT STEINFELD,
EPES RANDOLPH.

Subscribed and sworn to before me this 17th day of

December A. D. 1915. My commission expires Feb. 19, 1916.

[Seal] R. W. LANGWORTHY,
Notary Public, Pima County, Arizona.

Approved this 18th day of December, A. D. 1915.

WM. H. SAWTELLE,
Judge. [217]

State of Arizona,
County of Pima,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify that Albert Steinfeld and Epes Randolph, the parties to this bond whose signatures are subscribed thereto are in my opinion good and ample security for the amount therein specified, and that they have property within the said county of Pima, State of Arizona, subject to execution, in excess of the amount of said bond; and that if the bond was presented to me for approval the same would be accepted and approved.

Witness my hand this 23d day of December A. D. 1915.

GEORGE W. LEWIS,
Clerk.

[Endorsements]: No. 142. Phoenix. In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a corporation, Defendant. Supersedeas Bond on Writ of Error. Filed Dec. 18, 1915. George W. Lewis, Clerk. [218]

In the United States District Court for the District of Arizona.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY a Corporation,

Defendant.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon the writ of error heretofore sued out herein by the said Southern Pacific Company, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The plaintiff's complaint.
2. The summons and return of service.
3. The defendant's second amended pleas and answer.
4. The plaintiff's reply to defendant's second amended pleas and answer.
5. The empaneling of the jury.
6. The defendant's motion for a directed verdict.
7. The verdict.
8. The judgment.
9. The minute entries of the trial.
10. The bill of exceptions.

11. The petition for writ of error.
12. The assignment of errors.
13. The supersedeas bond and approval.
14. The order allowing writ of error.
15. The original writ of error.
16. The original citation in error.
17. The praecipe.
18. The clerk's certificate.

the said transcript to be filed with the clerk of the Circuit Court of Appeals of the Ninth Circuit, at San Francisco, Calif., before January sixteenth, 1916.

FRANCIS M. HARTMAN,
J. C. FOREST,
Attorney for Plaintiff in Error. [219]

[Admission of Service of Praecipe for Transcript of Record.]

In the United States District Court for the District of Arizona.

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY a Corporation,

Defendant.

Service of the foregoing praecipe in the above-entitled action is hereby admitted and accepted this

20th day of December, A. D. 1915.

HAYES & LANEY,
Attorney for Frank R. Stewart,
Defendant in Error, Plaintiff Below.

[Endorsements]: No 142. In the United States District Court for the District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Praecipe for Transcript. Filed Dec. 20, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [220]

In the United States District Court for the District of Arizona.

No. 142 (PHOENIX.)

FRANK R. STEWART,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY a Corporation,

Defendant.

Order Under Rule 16, Section 1, Enlarging Time to File Record and to Docket Case.

On consideration of the application of George W. Lewis, the clerk of the District Court of the United States for the District of Arizona, and good cause appearing therefor,

IT IS ORDERED that the time within which the original certified transcript of the record in the above-entitled cause may be filed and within which the cause may be docketed with the clerk of the

United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and hereby is enlarged to and including the 18th day of February, A. D., 1916.

Dated at Phoenix, Arizona, this 14th day of January, A. D., 1916.

WM. H. SAWTELLE,
Judge of the United States District Court for the District of Arizona.

[Endorsements]: No. 142 (Phx.) In the United States District Court for District of Arizona. Frank R. Stewart, Plaintiff, vs. Southern Pacific Co., Defendant. Order Enlarging Time to File Transcript of Record and to Docket Cause. Filed January 14, 1916. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [221]

In the United States District Court, District of Arizona.

No. 142 (PHOENIX.)

FRANK R. STEWART,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY a Corporation,
Defendant.

Certificate of Clerk of United States District Court to Transcript of Record.

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States

District Court for the District of Arizona, do hereby certify that the two hundred twenty-one (221) typewritten pages, numbered from one (1) to two hundred twenty-one (221), inclusive, constitutes a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause, and as is stipulated for by counsel of record herein, as the same remain of record on file in the office of the clerk of said District Court, and that the same constitutes the record on appeal from the judgment of said United States District Court for the District of Arizona, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid into my office by or on behalf of [222] the defendant for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905), for making typewritten transcript of record—686 folios at 30c per folio.....	$205.80
Certificate of Clerk to Typewritten Transcript of Record, 4 folios at 30c per folio	1.20
Seal to said Certificate.....	.40
	$207.40

I hereby certify that the above cost for preparing and certifying record, amounting to $207.40, has been paid to me by Francis M. Hartman, Esquire, one of counsel for the defendant herein.

I further certify that I hereto attach and herewith transmit the original Writ of Error and Citation in this cause, the same being numbered from page two hundred twenty-four (224) to page two hundred twenty-nine (229), inclusive.

WITNESS my hand and the Seal of said District Court, affixed this 3d day of February, A. D., 1916, at Phoenix, Arizona.

[Seal] GEORGE W. LEWIS,
Clerk.
By R. E. L. Webb,
Deputy Clerk. [223]

In the United States Circuit Court of Appeals for the Ninth Circuit.

SOUTHERN PACIFIC COMPANY a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable Judges of the District Court of the United States for the District of Arizona, Greeting:

Because in the record and proceedings as also in

the rendition of judgment of the plea which is now in the said District Court before you, between the Southern Pacific Company, plaintiff in error, and Frank R. Stewart, defendant in error, a manifest error has happened to the damage of Southern Pacific Company, a corporation, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath happened shall be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, where said court is sitting, within thirty days [224] from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected the said United States Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 18th day of December, in the year of our Lord one thousand nine hundred and fifteen.

[Seal] GEORGE W. LEWIS,
Clerk of the United States District Court for the District of Arizona.

Allowed this 18 day of December, A. D. 1915.

WM. H. SAWTELLE,

Judge of the District Court of the United States for the District of Arizona. [225]

[Endorsed]: No. 142. (Phx.) In the United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Frank R. Stewart, Defendant in Error. Writ of Error. Filed Dec. 18, 1915. George W. Lewis, Clerk. [226]

In the United States Circuit Court of Appeals for the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Citation [on Writ of Error].

United States of America,—ss.

To Frank R. Stewart, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, State of California, on the 16th day of January, A. D. 1916, pursuant to writ of error filed in the office of the clerk of the United States District Court for the District of Arizona, wherein the Southern Pacific Company, a corporation, is plaintiff in error, and

Frank R. Stewart is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected in order that speedy justice should be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 18th day of December, A. D. 1915.

WM. H. SAWTELLE,

United States District Judge for the District of Arizona. [227]

[Admission of Service of Citation on Writ of Error.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiff in Error,

vs.

FRANK R. STEWART,
Defendant in Error,

Service of the foregoing citation in the above-entitled action is hereby admitted and accepted this 20th day of December, A. D., 1915.

HAYES & LANEY,

Attorneys for Frank R. Stewart, Defendant in Error. [228]

[Endorsed]: No. 142. In the United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Frank R. Stewart, Defendant in Error. Citation. Filed Dec. 20, 1915, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy.

[Endorsed]: No. 2745. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Frank R. Stewart, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed February 5, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed April 4, 1916. F. D. Monckton, Clerk.

No. 2745

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Arizona.

PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the fifth day of May, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2745.

SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiff in Error,

vs.

FRANK R. STEWART,
Defendant in Error.

Order of Submission.

ORDERED, above-entitled cause argued by Mr. Francis M. Hartman, counsel for the plaintiff in error, and by Mr. P. H. Hayes, counsel for the defendant in error, and submitted to the Court for consideration and decision, with leave to counsel for the plaintiff in error to file typewritten additional authorities within ten (10) days from date.

At a stated term, to wit, the October term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the third day of July, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; Honorable WILLIAM C. VAN FLEET, District Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the cases were heard, ORDERED, that the typewritten opinion this day rendered by this Court in each of the following-entitled causes be forthwith filed by the clerk, and that a Judgment or Decree be filed, and recorded in the Minutes of this court in each of the causes in accordance with the opinion filed therein: * * * Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Frank R. Stewart, Defendant in Error. No. 2745, * * * .

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2745.

SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiff in Error,

vs.

FRANK R. STEWART,
Defendant in Error.

Opinion, U. S. Circuit Court of Appeals.

J. C. FOREST and FRANCIS M. HARTMAN, for the Plaintiff in Error.

HAYES & LANEY, for the Defendant in Error.

Before GILBERT, ROSS and HUNT, Circuit Judges.

The defendant in error, as plaintiff in an action in the court below, recovered a judgment against the defendant therein in the sum of $2090 damages for injuries to dairy cows shipped by the plaintiff on July 1, 1913, from San Luis Obispo, California, over the defendant's road and that of its connecting carrier, to Phoenix, Arizona. In the complaint it was alleged that the defendant negligently unloaded the animals on July 4, 1913, at Yuma, Arizona, when the weather was extremely hot, and into pens which were dusty and unprotected from the sun, instead of transporting them to their destination. To this it was answered that at the time when the cattle arrived at Yuma, they had been confined in the cars for about twenty hours without feed, water or rest,

and that it was necessary to unload them at that place in order to comply with the Twenty-eight Hour Law. Further answer was made that the cattle were being transported under a contract in writing, whereby the plaintiff agreed that in case of loss or damage to the cattle, notice in writing should be given to the defendant within ten days after unloading at destination, that otherwise all claims for loss or damage were waived, and that the plaintiff failed to give such notice within the time specified. It was further alleged that in said writing it was further stipulated that the agreed value of the cattle was the sum of $30 per head, and that in case of loss or damage for which the carrier might be liable, the amount claimed for each animal so lost or damaged should be adjusted on the basis of that agreed value; that the contract was made and entered into in consideration of the plaintiff obtaining a lower freight rate than would have been assessed had a higher valuation been placed upon the animals.

GILBERT, Circuit Judge, after stating the case:

Several assignments are addressed to alleged errors of the trial court in sustaining objections to testimony offered by the defendant, the object of which was to show that the feeding and rest pen at Yuma was maintained in as good condition as was customary with railroads in the southwest, and in as good condition as pens and corrals at El Paso, Texas, Tucson, Bowie and Phoenix, Arizona, and Indio, California. The evidence so offered would have tended only to show that the treatment of the

plaintiff's cattle at Yuma was the usual and ordinary treatment of cattle by the defendant and other carriers in that section of the country, or sections similar in climate. The evidence, if admitted, would not have tended to acquit the defendant of negligence. It would have been no defense to the negligence charged to prove that the defendant committed similar acts of negligence elsewhere. G. Trunk R. R. Co. vs. Richardson et al., 91 U. S. 454.

Error is assigned to the denial of the defendant's motion for an instructed verdict in its favor. The grounds of the motion were that it was necessary for the defendant to unload the cattle at Yuma in order to comply with the Twenty-eight Hour Law, that the plaintiff abandoned his cattle at that point, and that the damage was the result of his own gross negligence. The evidence was undisputed that the defendant's cattle pens at Yuma were open corrals in the sand, wholly without shade or covering of any kind, that the weather was very hot, that the cattle arrived at Yuma in good condition, and that the plaintiff earnestly and repeatedly protested against unloading the same at that point, and offered to sign and deliver to the defendant a release of all liability for forwarding the shipment to Gila, at which point the defendant had feed and rest pens. It is clear that under the pleadings and the evidence the defendant was not entitled to an instructed verdict. The Twenty-eight Hour Act, Section 1, required that the unloading should be into "properly equipped pens for rest, water and feeding." The evidence tended strongly to show that the pens at

Yuma were not properly equipped for rest, and there was evidence tending to show that the cattle could have been carried to Gila within the twenty-eight hour period, and to Phoenix within the thirty-six hour period, and that but for the defendant's persistent refusal to go further, the plaintiff would have given it a written consent to carry the cattle on to Phoenix without unloading. In charging the jury the Court said. "It is for you and you alone to determine whether or not the corrals and pens provided by the defendant company at Yuma were such as the law requires railroads to furnish for the proper unloading, feeding and resting and watering of cattle." The Court would not have been justified in ruling, as a matter of law, that the injury to the cattle resulted from their shipment from a cool, moist climate into an extremely hot climate, or that it resulted solely from the climatic conditions at Yuma. It is not disputed that the cattle arrived there in good condition, and it may be assumed that they might have been carried on their way without injury if they had not been unloaded into the pens which the jury evidently found unfit for the purpose for which they were used.

Error is assigned to the refusal of the Court to instruct the jury that if the plaintiff failed or neglected to attend to unloading and reloading his cattle at Yuma, or failed or neglected properly to care for his cattle at Yuma, the defendant will not be liable for any loss or damage due to such failure on the plaintiff's part. It is contended that the defendant was entitled to that instruction for the rea-

son that the plaintiff had agreed and bound himself to unload and reload the cattle at the resting places, and to feed and water the same at his expense and to accompany and attend to them en route. The requested instruction was not appropriate to any of the evidence in the case. The cause of injury to the cattle was not the manner of their unloading or their care, but the fact that they were placed in pens unfit for rest and feeding.

Nor do we find that the trial Court erred in denying the special instruction requested by the defendant to the effect that if the jury believed that at the time when the cattle arrived at Yuma they had been confined in the cars approximately nineteen hours without feed or rest, and that it was more humane and better for them to be unloaded at Yuma for feed and rest than to transport them beyond that point and keep them confined in the cars, their verdict should be in favor of the defendant, and that if they believed it was less injurious to said animals to unload them at Yuma than to have kept them confined for nine hours or eighteen hours longer, they should find for the defendant. These instructions were open to the objection that they ignored the right of the plaintiff to control the shipment. He had the right, if he so elected, to require the defendant to carry them on under his release in writing, which he repeatedly offered to execute. Again, the effect of the instructions, if given, would have been to permit the jury to disregard all the evidence of the defendant's negligence in failing to maintain at Yuma proper pens for feeding and rest.

The defendant urges that the court below erred in refusing to charge as requested that the plaintiff could not recover for any loss or damage to the cattle, for the reason that he failed to make written demand on the defendant within ten days after unloading at the final destination, when he knew of all the damage to the cattle, or could, by the exercise of reasonable diligence have known the same. The requested instruction was in accordance with the defense pleaded in the defendant's answer. To that defense the plaintiff had replied that he was relieved from compliance with the provisions as to notice in writing within ten days by the facts that on July 4, 1913, and at all times subsequent thereto, the defendant had full knowledge and notice of the injuries and damages to the plaintiff's cattle; that prior to reloading the cattle on that day, five of them had died, that the defendant found it necessary to provide an additional car in which to reload thirteen of the crippled and sick cattle, that at various points between Yuma and Phoenix the train officials in charge of the shipment received telegraphic inquiries from other officials of the defendant inquiring as to the condition and welfare of the cattle, that after arrival at Phoenix, one of the crippled animals remained in the defendant's car for more than a week, that from the unloading of the shipment at Phoenix, until October 21st of that year, the plaintiff and the agents of the defendant and its connecting carrier were almost daily in communication relative to the damages sustained by the plaintiff, that the nature and extent of the injuries to the cattle

which arrived alive were such as to render it impossible to determine the amount and extent thereof within the ten-day period, that a number thereof died many days after their arrival at Phoenix, as the result of such injuries, and that the defendant on many occasions prior to October 21st recognized the plaintiff's right to recover on account of his damages. There was proof tending to sustain all the facts so alleged in the reply. We think, therefore, that the court below committed no error in instructing the jury that in view of the evidence, if they found it to be true, the plaintiff was relieved and released from giving notice within the ten days. Cockrill vs. Missouri K. & T. Ry. Co., 136 Pac. 322, and cases there cited; Pierson vs. Northern Pac. Ry. Co., 61 Wash. 450; Chicago, R. I. & P. Ry. Co. vs. Spears, 122 Pac. 228; Missouri K. & T. Ry. Co. vs. Frogley, 75 Kan 440; Adams v. Colorado & S. Ry. Co., 113 Pac. 1010.

In the contract between the plaintiff and the defendant it was stipulated, in consideration of the freight rate, that the value of the cattle should be taken and deemed to be $30 per head. The plaintiff in his complaint demanded the sum of $30 per head for 11 cows lost, and $20 per head for injury to 87 head that survived. The defendant contends that it was entitled to have the jury instructed that if the animals after delivery at destination were still of the value of $30 per head, together with the freight charges, plaintiff was not entitled to recover anything for damages thereto. We think the defendant was not entitled to the requested instruc-

tion. The stipulation as to the amount recoverable for loss or damage to cattle was intended only for the purpose of fixing a limit to the amount to be recovered in case either of loss or damage. It did not fix the value as $30 for loss and for a proportionate limit in case of damage. 5 Am. & Eng. Ency. of Law, 335; Starnes vs. Railroad, 91 Tenn. 516.

The defendant assigns error to the Court's instruction to the jury that the measure of damages for the cattle injured would be the difference between the market value of such cattle in their normal condition after making the trip from the point of shipment to Phoenix, and the condition in which they were actually delivered at Phoenix, not to exceed $30 per head. It is said that this instruction is contrary to the provision of the shipping contract which stipulated that damages would be adjusted on the basis of value at the "time and place of shipment, not exceeding the declared value." The defendant is in no position to claim reversible error in the instruction so given. All the testimony as to value was given with reference to the value of the cattle after their arrival at Phoenix. No exception was taken to the evidence so given, nor does it appear that the values of the cattle at Phoenix were different from their values at San Luis Obispo. It is not shown, therefore, that the defendant could have been prejudiced by the instruction. The record shows also that the defendant took no proper exception to that precise portion of the charge. The exception taken included a general charge covering

other matters, some portions of which were not subject to objection.

We find no error. The judgment is affirmed.

[Endorsed]: Opinion. Filed July 3, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2745.

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Judgment, U. S. Circuit Court of Appeals.

In Error to the District Court of the United States for the District of Arizona,

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the ———— District of Arizona, and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the ———— judgment of the said District Court ———— in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plain-

tiff in error for his costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and Entered July 3, 1916. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the ninth day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2745.

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Order Denying Petition for a Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert, Erskine M. Ross and William H. Hunt, Circuit Judges, before whom the case was heard, it is ORDERED, that the Petition, filed July 25, 1916, on behalf of the plaintiff in error, for a rehearing of the above-entitled cause, be, and hereby is denied.

At a stated term, to wit, the October term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the thirteenth day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2745.

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Order Staying Issuance of Mandate Thirty Days from Date.

Upon motion of Mr. Frank C. Cleary, counsel for the plaintiff in error, and good cause therefor appearing, ORDERED, issuance of Mandate under Rule 32 of this court in the above-entitled cause, stayed for a period of thirty (30) days from date.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2745.

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Petition for Writ of Error and Supersedeas.

The above-named plaintiff in error, Southern Pacific Company, a corporation, deeming itself aggrieved by the judgment of the Honorable United States Circuit Court of Appeals for the Ninth Circuit, entered in a cause entitled "Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Frank R. Stewart, Defendant in Error," on or about the 3d day of July, 1916, comes now, by Henley C. Booth, Esquire, its attorney, and petitions said United States Circuit Court of Appeals for the Ninth Circuit, for an order allowing said Southern Pacific Company to prosecute a writ of error and have the same allowed and issued from the Supreme Court of the United States to said United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and that a transcript of the record, proceedings, documentary exhibits and papers in the cause upon which said judgment was made, duly authenticated, may be sent to said Su-

preme Court of the United States, and, also, that an order may be made by this Honorable Court fixing the amount of the bond which the said plaintiff in error shall give and furnish upon said writ of error, and that, upon the filing of such bond all proceedings in said cause in the United States Circuit Court of Appeals for the Ninth Circuit and in the District Court of the United States for the District of Arizona, be suspended and stayed until the determination of such writ of error by the Honorable, The Supreme Court of the United States;

And in this behalf, your petitioner shows that said judgment of said United States Circuit Court of Appeals for the Ninth Circuit was rendered in an action at law, and that the matter in controversy exceeds one thousand dollars ($1,000), besides costs, and amounts to, to wit, the sum of two thousand ninety dollars ($2,090), and, in addition thereto, costs taxed, amounting to ninety-three dollars and sixty cents ($93.60), and interest, and that the judgment of the said United States Circuit Court of Appeals for the Ninth Circuit, is not made final by the provisions of the act of Congress of the United States of America, entitled "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary," approved March 3d, 1911, as amended, and that plaintiff in error is entitled to said writ of error under the provisions of Section 241 of said act, and of Section 128 thereof, as amended by the Act of Congress approved January 28th, 1915, entitled "An Act to Amend an Act Entitled 'An Act to Codify, Revise and Amend the Laws relating to the Judiciary,' approved March 3d, 1911."

And your petitioner will ever pray.

HENLEY C. BOOTH,
Attorney for Petitioner.

State of California,
City and County of San Francisco,—ss.

Henley C. Booth, being duly sworn, says:

That he is an attorney at law and is authorized by Southern Pacific Company to make and does make this affidavit on its behalf; that he has read the foregoing petition and knows its contents and that the matters and things therein set forth are true of his own knowledge, and in particular affiant states that the amount involved in said cause, exceeds one thousand dollars ($1,000), besides costs.

HENLEY C. BOOTH.

Subscribed and sworn to before me this 8th day of November, 1916.

HUGH T. SIME,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Petition for Writ of Error and Supersedeas. Filed Nov. 11, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2745.

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Assignment of Errors.

The plaintiff in error complains of errors in the proceedings in the United States Circuit Court of Appeals, for the Ninth Circuit, in said cause and in the opinion and judgment rendered, made and entered therein, in the above-named court, on the 3d day of July, 1916, and assigns the following as the errors complained of:

1. The Court erred in overruling the Assignment of Error No. 24, contained in the Assignment of Errors filed on the 18th day of December, 1915, by said Southern Pacific Company, in the District Court of the United States, for the District of Arizona, with the petition for writ of error for the review of the judgment of said United States District Court in this cause, rendered October 29, 1915, against the plaintiff in error, defendant in said court, and in favor of the defendant in error, plaintiff therein, and which said writ was returnable to the United States Circuit Court of Appeals, for the Ninth Circuit: *i. e.*, it erred in holding that there was no error on

the part of the said United States District Court in charging the jury in the general charge as follows, viz.:

"The defendant company also pleads that notwithstanding the fact that it may have been guilty of negligence in the particulars set out in the complaint, nevertheless the plaintiff in this case cannot recover, because the contract heretofore referred to (and which was signed by the plaintiff, and by Mr. Ford and Mr. Whitton, on behalf of the plaintiff, who were thereunto duly authorized) provides that the 'second party hereby further agrees that in case of any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by the second party on the freight claim agent of the first party in writing within ten days after unloading of the livestock; and that in event of failure so to do, all claims for loss or damages in the premises are hereby expressly waived, released and made void.' Defendant alleges that no claim for loss or injury to said cattle was presented to it, or any of its agents or employees within the ten-day period. If you find this to be true, then, of course, the plaintiff cannot recover unless you further find that the defendant waived this provision of the contract, or that the plaintiff was relieved from a compliance therewith as is hereinafter stated. The plaintiff, in reply to this contention that the claim should have been presented in writing within ten days after the unloading of the livestock, alleges that he was relieved from compliance with the above-quoted provision in that 'on the 4th day of July,

1913, and at all times subsequent to the arrival of said cattle at * * * Yuma—(I say, subsequent to the arrival at Yuma)—the defendant had full knowledge and notice of the injuries and damages to plaintiff's cattle as set forth in its said complaint; that said cattle were unloaded by the defendant into its stock-pens at the station of Yuma between the hours of 9 and 10 o'clock A. M. on the 4th day of July, 1913, and between said dates and the hour of 7:30 P. M. of said day, and prior to the reloading of the cattle into defendant's cars, five of said cows died. * * * That upon reloading the said cattle it became necessary to provide, and the defendant did provide, an additional car in which to ship thirteen of the crippled and sick cattle of the plaintiff to their destination at Phoenix; that at various points between said station of Yuma and the city of Phoenix the train officials in charge of said shipment received telegraphic inquiries from other officials of the defendant inquiring as to the condition and welfare of said shipment; that upon the arrival of said shipment at Phoenix, Arizona, one of said crippled animals remained in defendant's car for a period of more than a week; and that immediately after the unloading of said shipment at Phoenix, Arizona, and almost daily from said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizona Eastern Railroad Company and of this defendant were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the plaintiff's cows which arrived at the destination alive were such as to render it impossible for the

plaintiff, or any other person else in the exercise of due care and diligence, to determine the amount and extent of damage sustained by the plaintiff within the said ten-day period; that a number of said cattle died many days after their arrival at Phoenix, Arizona, as the result of such injuries. . . . That the defendant had on many occasions prior to the 21st day of October, 1913, recognized plaintiff's right to recover in some amount on account of his damages, sustained as set forth in his said complaint, and has on many occasions attempted to settle and compromise said claim with the plaintiff.' I repeat those allegations of the reply in order to show what the plaintiff claims as his reason or excuse for not having presented his claim in writing to the defendant company or its agents within ten days from the date of such loss or injury, as is provided by the contracts.

I charge you as matter of law that if you believe the defendant or its agents or employees did know that five or more of the cattle died while in transit, and also believe that the defendant was negotiating with the plaintiff for a settlement of his claim, and that the defendant knew that the cattle had been injured as alleged in the plaintiff's complaint, then the plaintiff was relieved and released from the giving of such notice of loss or injury within ten days as required by the said provision of said contracts."

2. The Court erred in overruling said Assignment of Error No. 24, and in holding that tnere was no error on the part of the United States District Court in charging the jury in its general charge as hereinbefore stated, for the reason that the defendant, Southern Pacific Company, plaintiff in error in

this court, could not legally by conduct, oral statements or otherwise waive the provision of the shipping contract or contracts referred to and quoted in said portion of the Court's general charge to the jury, viz.:

"That the 'second party hereby further agrees that in case any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by the second party on the freight claim agent of the first party in writing within ten days after unloading of the live-stock; and that in event of failure so to do, all claims for loss or damage in the premises are hereby expressly waived, released and made void.' "

And that said provision was binding upon both parties to said contract or contracts, and could not be waived; and that compliance therewith on the part of the plaintiff, Frank R. Stewart, could not be legally dispensed with by the defendant, Southern Pacific Company, now plaintiff in error, and that said plaintiff, Frank R. Stewart, could not be legally excused for not having presented his claim in writing to the defendant company, or its agents, within ten days from the date of such loss or injury as is provided by the contracts, nor released from the giving of such notice of loss or injury within that time by any of the following alleged facts or circumstances, viz.:

That the defendant Southern Pacific Company, or its agents or employees, knew that five or more of the cattle died while in transit, and that it was negotiating with the plaintiff, Frank R. Stewart, for a settle-

ment of his claim, and that the defendant, Southern Pacific Company, knew that the cattle had been injured as alleged in the plaintiff's complaint; nor by any of the alleged facts and circumstances mentioned and referred to in the aforesaid portion of the general charge as constituting plaintiff's reason or excuse for not having presented his claim in writing to the defendant, Southern Pacific Company, or its agents, within said time; nor by any course of conduct or negotiation on the part of the plaintiff and the defendant, Southern Pacific Company.

3. The Court erred in overruling said assignment of error No. 24, and in holding that there was no error on the part of said United States District Court in charging the jury, in its general charge, as hereinbefore stated, for the further reasons that the evidence showed that plaintiff in error had never waived the giving of said ten day notice; that it was entirely possible for defendant in error to have given the notice as to his alleged claim for damages to the cattle, within the period of ten days, after the unloading of the livestock at Phoenix, as required by the terms of the bills of lading; that he admitted he knew, within the ten days, that he had an alleged claim for damages as to some, if not all, of the cattle, and that he knew or should have known within that time the condition of the cattle, and for the further reason that any negotiations which defendant in error may have had with plaintiff in error, with reference to compromise or settlement, did not constitute a waiver on the part of plaintiff in error of the provisions in said contracts or bills of lading requiring written

claim for loss or damage to be made within ten days after the animals were unloaded at destination.

4. The Court erred in affirming the judgment of said United States District Court, notwithstanding the error of said lower court, for the reasons hereinabove mentioned in Assignment of Error No. 2 and/or in Assignment of Error No. 3, in giving to the jury, in the general charge, the instructions hereinabove set out in Assignment of Error No. 1.

5. The Court erred in overruling Assignment of Error No. 12, contained in the aforesaid assignment of errors filed on the 18th day of December, 1915, by said Southern Pacific Company, in the District Court of the United States, for the District of Arizona, *i. e.*, it erred in holding that there was no error on the part of the said United States District Court in refusing to give the special charge to the jury requested by the plaintiff in error, defendant in said District Court, in the words following, viz.:

> "9. If you believe from the evidence that plaintiff knew, or could have known by the exercise of reasonable diligence, within ten days after unloading said animals at destination, that eighty-seven head of said animals were injured or damaged in the sum of twenty dollars per head, as alleged by plaintiff, and plaintiff did not, within ten days after unloading said animals at destination, make written demand upon defendant or any of its agents for such alleged loss or damage, then you are instructed that plaintiff cannot recover for such alleged loss or damage."

For the reason that the testimony of plaintiff himself shows that he knew, within ten days after unloading said animals at destination, that he had an alleged claim for damages to the eighty-seven head of animals referred to; that he refused to pay the freight charges at destination, giving as a reason therefor his alleged claim; and the evidence also shows that he knew, or could have known, by the exercise of reasonable diligence, within ten days after the unloading of said animals at destination, whether or not he had a claim for damages to said eighty-seven head; and for the reason that the question as to whether or not said plaintiff, defendant in error in this court, knew, or could have known by the exercise of reasonable diligence, within ten days after the unloading of said animals at destination, whether or not he had a claim for damages to the eighty-seven head, was one of the issues involved in said case, and should have been submitted to the jury; and for the reason that the said plaintiff admitted that, by himself and his agents, he made and entered into the livestock shipping contracts and bills of lading offered in evidence in the case, and these contracts and bills of lading contained a provision wherein and whereby the shipper agreed that in case any loss or damage shall have been sustained for which the first party, viz., Southern Pacific Company, plaintiff in error herein, is liable, demand or claim for such loss or damage will be made by second party, to wit, the defendant in error herein, on the freight claim agent of first party, in writing, within ten days after unloading of the livestock, and that in event of failure

so to do, all claims for loss or damage in the premises are hereby expressly waived, released and made void, and that said provision was valid and binding.

6. The Court erred in affirming the aforesaid judgment of said United States District Court, notwithstanding the error of said lower court, for the reasons mentioned in the last preceding assignment of error, viz., the fifth assignment of error, in refusing to give the aforesaid special charge to the jury, requested by said defendant, Southern Pacific Company, and last hereinabove set forth.

7. The Court erred in overruling Assignment of Error No. 5 contained in the aforesaid assignment of errors filed by said Southern Pacific Company, December 18, 1915, in the above-mentioned District Court, *i. e.*, it erred in holding that there was no error on the part of said United States District Court in denying and refusing to grant the motion made by plaintiff in error, defendant below, at the close of the testimony, for a directed verdict in its favor, for the following reasons, viz.:

(1) That it was necessary for plaintiff in error to unload the cattle at Yuma in order to comply with the Federal Act known as "The Twenty-Eight Hour Law," and that defendant in error is basing his claim for damages upon the fact that the cattle were unloaded at Yuma instead of transporting them on to Phoenix, Arizona, their destination;

(2) That the defendant in error, plaintiff below, abandoned his said cattle at Yuma upon arrival at that place and refused to have anything further to

do with them and refused and neglected to care for said cattle;

(3) That the evidence showed that if the defendant in error had taken proper care of said cattle at Yuma, Arizona, they would not have suffered any damage or injury;

(4) That the evidence also showed that all of the alleged loss, injury and damage to said cattle was caused wholly and solely by the gross negligence, fault and want of care of the defendant in error himself;

(5) That the undisputed evidence showed that if any loss, injury or damage occurred to said cattle the same was due to the fact that plaintiff caused said cattle to be shipped from a cool, moist climate, into an extremely hot and dry climate on the 4th of July, 1913;

(6) That the undisputed evidence showed that if any loss or damage occurred to said cattle, the same was due solely and entirely to the climatic conditions, for which plaintiff in error was not liable or responsible;

(7) That the undisputed evidence showed that the defendant in error, plaintiff below, knew at the time he shipped the cattle the climatic conditions then existing at Yuma, Arizona, and selected the time for such shipment, and for which plaintiff in error was not liable;

(8) That the undisputed testimony showed that prior to or at about the time the cattle were shipped from San Luis Obispo, California, defendant in error made and entered into a contract in writing with

plaintiff in error, wherein and whereby defendant in error specifically agreed that plaintiff in error should not be liable for any loss, injury or damage to said livestock resulting from heat or climatic conditions;

(9) That the undisputed evidence showed that if any loss, injury or damage occurred to said cattle, the same was due solely and entirely to the heat and climatic conditions existing at the time at Yuma, Arizona;

(10) That the undisputed evidence showed, and it was admitted by defendant in error that at the time of the shipment of said cattle from San Luis Obispo, California, he made and entered into a contract in writing to and with the plaintiff in error, wherein and whereby he specifically agreed and bound himself to load said livestock at point of shipment, unload and reload at resting places and to feed and water the same at his own expense and to accompany and attend said livestock en route and to destination; and wherein and whereby defendant in error specifically agreed to attend and care for said livestock during the course of such shipment; and for the reason that the undisputed evidence showed that the defendant in error failed, neglected and refused to attend and care for said cattle at said town of Yuma, the place at which defendant in error alleged that his said cattle were injured and damaged by reason of having been unloaded for feed and rest;

(11) That the evidence showed, and it was admitted by defendant in error, that he made and entered into a written contract, as above referred to, wherein and whereby, among other things, it was

agreed by and between the parties that the plaintiff in error, the railroad company was not required to deliver said cattle to defendant in error at destination unless the transportation charges on the same were paid; and for the further reason that it was admitted by the defendant in error that he did not pay the transportation charges;

(12) That the undisputed evidence showed that there was no negligence whatever on the part of plaintiff in error, defendant below, in the handling and transportation of said cattle; and

(13) That the evidence failed to show any negligence whatsoever on the part of plaintiff in error, defendant below, in the handling and transportation of said cattle.

8. The Court erred in affirming the aforesaid judgment of said United States District Court, notwithstanding the error of said lower court in denying and refusing to grant said motion made by plaintiff in error, defendant below, at the close of the testimony, for a directed verdict in its favor.

9. That the Court erred in affirming the aforesaid judgment of said District Court of the United States for the District of Arizona entered in the cause on or about October 29th, 1915, for the reason that said judgment was and is contrary to the evidence and the law.

WHEREFORE, said plaintiff in error, Southern Pacific Company, prays that the aforesaid judgment and decree made, rendered and entered in and by said United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause on the 3d

day of July, 1916, affirming the judgment rendered in favor of defendant in error, plaintiff below, in said District Court of the United States for the District of Arizona, be reversed; and for such other relief as may be proper.

HENLEY C. BOOTH,
Attorney for Plaintiff in Error, Southern Pacific Company.

[Endorsed]: Assignment of Errors. Filed Nov. 11, 1916.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2745.

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond.

Upon the filing of the petition of the above-named Southern Pacific Company, a corporation, for a Writ of Error, together with an Assignment of Errors,

IT IS ORDERED that a Writ of Error as prayed for in said Petition, be and it is hereby allowed to said Southern Pacific Company, to have reviewed, by the Supreme Court of the United States, the judgment heretofore entered in the above-entitled cause,

and the proceedings in the trial of said cause prior thereto, and that the amount of the bond to be filed in this court by said Southern Pacific Company in connection with the writ of error prayed for, be and is hereby fixed in the sum of Three Thousand Dollars ($3,000);

AND IT IS HEREBY ORDERED that upon the filing of an approved bond in said amount all further proceedings in said United States Circuit Court of Appeals for the Ninth Circuit in said cause shall be suspended and stayed until the determination of such writ of error by the Supreme Court of the United States.

Dated this 11th day of November, 1916.

WM. B. GILBERT,
Circuit Judge.

[Endorsed]: Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond. Filed Nov. 11, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2745.

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Southern Pacific Company, a corpora-

tion, plaintiff in error in above-entitled cause, as principal, and United States Fidelity and Guaranty Company, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, for the purpose of making and guaranteeing and becoming surety upon bonds or undertakings required or authorized by law, and as such corporation authorized to do business, and doing business, in the States of California and Arizona, and elsewhere, as surety, are held and firmly bound unto Frank R. Stewart, the defendant in error in the above-entitled cause, in the sum of Three Thousand Dollars ($3,000), to be paid to the said Frank R. Stewart, defendant in error herein, his heirs, executors, administrators and assigns, for the payment of which sum, well and truly to be made, we bind ourselves and each of us, and our and each of our successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated this 11th day of November, 1916.

WHEREAS, lately, at a regular term of the District Court of the United States, for the District of Arizona, sitting at Phoenix, in said District, in a suit pending in said court, between Frank R. Stewart, as plaintiff, and the Southern Pacific Company, a corporation, as defendant, being cause No. 142 on the law docket of said court, final judgment was rendered against said Southern Pacific Company, a corporation, for the sum of Two Thousand and Ninety Dollars ($2,090), with interest thereon at the rate of six per cent (6%) per annum from date thereof until

paid, and for costs of suit taxed at $93.60, with like interest thereon; and

WHEREAS said Southern Pacific Company thereafter obtained a Writ of Error, returnable to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment of said United States District Court in the said suit, and filed said writ in the clerk's office of said District Court; and

WHEREAS said cause thereafter duly came on to be heard on said writ of error in said United States Circuit Court of Appeals for the Ninth Circuit, and on the 3d day of July, 1916, said Court rendered its opinion and made and entered its jugment affirming said judgment entered in said cause, in favor of said plaintiff, Frank R. Stewart, in said United States District Court; and

WHEREAS said Southern Pacific Company has obtained a Writ of Error, returnable to the Supreme Court of the United States, and filed the said writ in the clerk's office of said United States Circuit Court of Appeals, to reverse said judgment of said United States Circuit Court of Appeals in the said cause, and a citation has been issued in said court directed to said Frank R. Stewart, defendant in error, citing him to be and appear before the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, according to law, within sixty (60) days from the date thereof;

NOW, the condition of the above obligation is such that, if the said Southern Pacific Company, a corporation, shall prosecute said Writ of Error last

mentioned to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation shall be void; otherwise, the same shall be and remain in full force and effect.

[Seal] SOUTHERN PACIFIC COMPANY,
By G. [illegible]. KING,
Assistant Secretary.

UNITED STATES FIDELITY AND GUARANTY COMPANY.
(Seal)
By H. V. D. JOHNS,
Attorney in Fact.
W. S. ALEXANDER,
Attorney in Fact.

State of California,
City and County of San Francisco,—ss.

On this 11th day of November, in the year one thousand nine hundred and sixteen, before me, M. J. Cleveland, a notary public in and for the City and County of San Francisco, personally appeared H. V. D. Johns and W. S. Alexander, known to me to be the persons whose names are subscribed to the within instrument as the attorneys in fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and their own names as Attorneys in Fact.

[Seal] M. J. CLEVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

State of California,
City and County of San Francisco,—ss.

On this 11th day of November, in the year one thousand nine hundred and sixteen, before me, E. B. Ryan, a notary public in and for the said city and county, residing therein, duly commissioned and sworn, personally appeared G. L. King, known to me to be the assistant secretary of Southern Pacific Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed said instrument on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year in this Certificate first above written.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

The above and foregoing bond upon Writ of Error is hereby approved and the same shall operate as a supersedeas.

Dated November 11th, 1916.

WM. B. GILBERT,
Circuit Judge for the Ninth Judicial Circuit.

[Endorsed]: Supersedeas Bond on Writ of Error. Filed Nov. 11, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2745.

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Praecipe for Certified Transcript of Record on Return to Writ of Error from Supreme Court of United States.

To the Clerk of said Court:

Sir: Please make and furnish me with a certified transcript of the record (including the proceedings had in said Circuit Court of Appeals) and not less than thirty uncertified copies thereof, for use on Writ of Error from the Supreme Court of the United States in the above-entitled cause, the said transcript to consist of a copy of the following:

Printed transcript of record on which the cause was heard in said Circuit Court of Appeals to which will be added a printed copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz.:

Order of submission, entered May 5, 1916;

Order directing filing of opinion, etc., entered July 3, 1916;

Opinion filed July 3, 1916;

Judgment, filed and entered July 3, 1916;

Order denying petition for rehearing, entered Oct. 9, 1916;

Order staying issuance of mandate entered Oct. 13, 1916.

The following papers on Writ of Error returnable in Supreme Court, of the United States, filed November 11, 1916;

Petition;

Assignment of errors;

Order allowing writ of error and fixing amount of supersedeas bond;

Supersedeas bond;

Praecipe for transcript of record, filed Nov. 24, 1916;

Writ of error, filed Nov. 11, 1916;

Citation on writ of error, filed Nov. 24, 1916;

Certificate of clerk, U. S. Circuit Court of Appeals, to transcript of record, dated Dec. 1, 1916.

Please prepare thirty or more uncertified copies of said record by printing thirty or more copies of the above-entitled proceedings that were had and papers that were filed in said cause in said Circuit Court of Appeals, and by binding one of the latter printed copies of said proceedings, etc., at the end of each of the thirty or more extra copies of the printed transcript of record on which said cause was heard in said Circuit Court of Appeals.

HENLEY C. BOOTH,
Attorney for Plaintiff in Error.

[Endorsed]: Praecipe for Certified Transcript of Record on Return to Writ of Error from Supreme Court of United States. Filed Nov. 24, 1916. F. D. Monckton, Clerk.

Service of the within praecipe is admitted this 17th day of November, 1916.

HAYES & LANEY.
Attorneys for Defendant in Error.

United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2745.

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK R. STEWART,

Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record Upon Return to Writ of Error from the Supreme Court of the United States.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and eighty-five (285) pages, numbered from and including 1 to and including 285, to be a true copy of the record, and of the assignment of errors, and of all proceedings in the above-entitled case, made up pursuant to the praecipe filed by counsel for the plaintiff in error on the 24th day of November, A. D. 1916, under Rule 8 of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office, and that the same constitute the Transcript of Record and return to the Writ of Error from the Supreme Court of the United States in the above-entitled cause, as made up and certified pursuant to said praecipe.

ATTEST my hand and the seal of the said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this first day of December, A. D. 1916.

[Seal] F. D. MONCKTON,
Clerk.

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said United States Circuit Court of Appeals before you, wherein Southern Pacific Company, a corporation, is plaintiff in error, and Frank R. Stewart is defendant in error, manifest error hath happened, to the great damage of the Southern Pacific Company, a corporation, plaintiff in error, as by its complaint appears,

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, within sixty (60) days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS, the Hon. EDWARD D. WHITE, Chief Justice of the United States, this 11th day of November, in the year of our Lord one thousand nine hundred and sixteen.

[Seal] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed this 11th day of November, A. D. 1916.

WM. B. GILBERT,
United States Circuit Judge for the Ninth Judicial Circuit.

[Endorsed]: Writ of Error. Filed Nov. 24, 1916. F. D. Monckton, Clerk.

Return to Writ of Error.

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

Dated at San Francisco, Cal., this 1st day of December, A. D. 1916.

JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

[Seal] By F. D. MONCKTON,
Clerk.

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to Frank R. Stewart, Greeting:

You are hereby notified that in a certain cause in the United States Circuit Court of Appeals for the Ninth Circuit, wherein Southern Pacific Company, a corporation, is plaintiff in error, and Frank R. Stewart, is defendant in error the said plaintiff in error has prayed a Writ of Error to the Supreme Court of the United States from the judgment of said United States Circuit Court of Appeals in said cause entered on or about the 3d day of July, 1916, and that said plea has been allowed,

WHEREFORE, you are hereby cited and admonished to appear in the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 8th day of January, 1917, being within sixty (60) days from the date hereof, to show cause why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. WILLIAM B. GILBERT, Senior United States Circuit Judge for the Ninth Judicial Circuit, this 11th day of November, 1916.

WM. B. GILBERT,
United States Circuit Judge.

Service of the within citation is hereby admitted and accepted this 17th day of November, 1916.

HAYES & LANEY,
Attorneys for Defendant in Error.

[Endorsed]: Citation on Writ of Error. Filed Nov. 24, 1916. F. D. Monckton, Clerk.

OFFICE SUPREME COURT, U. S.
FILED
APR 18 1917
JAMES D. MAHER
CLERK

-12-

MOTION TO DISMISS APPEAL.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted] 348 89

SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

FRANK R. STEWART, DEFENDANT IN ERROR

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

P. H. HAYES,
Of Counsel.

THOMAS ARMSTRONG, JR.,
Attorney for Defendant.

No. 836.

IN THE SUPREME COURT OF THE UNITED STATES.

SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

FRANK R. STEWART, DEFENDANT IN ERROR

MOTION TO DISMISS APPEAL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

IN THE SUPREME COURT OF THE UNITED STATES.

SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

vs.

FRANK R. STEWART,
Defendant in Error.

No. 836.

MOTION TO DISMISS APPEAL.

And now comes the Defendant in Error and moves the Court to dismiss the appeal filed herein and for cause shows:

That the judgment of the United States Circuit Court of Appeals for the Ninth Circuit in this case is made final by the provisions of Section 128 of the Act of Congress of the United States of America, entitled: "An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary," approved March 3, 1911, as amended, for the reasons:

(1). That the jurisdiction of the said United States Circuit Court of Appeals was dependent entirely upon the plaintiff and defendant in error herein being citizens of different states;

(2). That no question of the jurisdiction of the said United States Circuit Court of Appeals is raised therein; that said action is an ordinary action at law for damages arising through the alleged negligence of the plaintiff in error; that said cause does not involve the construction or application of the constitution of the United States, the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority; nor does it involve any question in which the constitutionality or law of any state is claimed to be in contravention to the constitution of the United States;

(3). That no questions or propositions therein raised have been certified to this Court by said Circuit Court of Appeals for its interpretation or decision.

THOMAS ARMSTRONG, JR.,
Attorney for Defendant in Error.

ARGUMENT.

Frank R. Stewart, a citizen of Arizona, filed his complaint in the Superior Court of the State of Arizona, in and for the County of Maricopa, July 2nd, 1911, against the Southern Pacific Company, a corporation organized under the laws of the State of Kentucky, for the recovery of damages for the negligent handling and transportation of 152 head of dairy cows, from San Luis Obispo, California, to Phoenix, Arizona. (Trans. pp. 1-7). On the 23rd day of July, 1915, the cause was

removed to the United States District Court for the District of Arizona upon removal proceedings filed in the Superior Court by the Southern Pacific Company. The transcript of the record is defective in that it nowhere discloses the citizenship of the Southern Pacific Company, Plaintiff in Error, nor any of the proceedings had upon the removal of the cause from the Superior Court of the State of Arizona; however, for the purposes of this motion, the defendant in error admits the citizenship of the Southern Pacific Company and that its petition for removal did recite the diversity of citizenship of the Plaintiff and Defendant.

The cause was tried in the United States District Court with a jury, and a verdict found for the plaintiff in the sum of $2,090, and the judgment of the Court was rendered thereon for such amount. Thereupon the Southern Pacific Company filed its petition for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, which petition was allowed, the appeal perfected, and the United States Circuit Court of Appeals, after hearing the Southern Pacific Company upon its errors assigned, rendered its opinion sustaining the United States District Court for the District of Arizona.

The Southern Pacific Company now prosecutes its writ of error in this Court setting up in its petition as the only jurisdictional grounds for review the following:

"And in this behalf, your petitioner shows that said judgment of said United States Circuit Court of Appeals for the Ninth Circuit was rendered in an action

at law, and that the matter in controversy exceeds one thousand dollars ($1,000), besides costs, and amounts to, to-wit, the sum of two thousand ninety dollars ($2,090), and interest, and that the judgment of the said United States Circuit Court of Appeals for the Ninth Circuit, is not made final by the provisions of the act of Congress of the United States of America, entitled, "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary," approved March 3rd, 1911, as amended, and that plaintiff in error is entitled to said writ of error under the provisions of Section 241 of said act, and of Section 128 thereof, as amended by the Act of Congress approved January 28th, 1915, entitled 'An Act to Codify, Revise and Amend the Laws Relating to the Judiciary', approved March 3rd, 1911." (Trans. p. 263).

This Court has repeatedly held the decision and judgment of United States Circuit Courts of Appeals to be final in causes such as this and that the amount in controversy will not have the effect of conferring jurisdiction unless some one or more of the questions enumerated in subdivisions numbered (2) and (3) of this motion are raised by the appeal.

The following are a few of the many decisions of this Court denying right of appeal in cases such as this:

Rouse v. Setcher, 156 U. S. 47;
Harding v. Hart, 187 U. S. 638;
Spencer v. Driplan Silk Co., 191 U. S. 526;

In Re Huguley Manufacturing Co., et al., 184 U. S. 297;

Press Pub. Co. v. Nonroe, 164 U. S. 110, 111;

Ayres v. Polsdorfer, 187 U. S. 588-595;

Exparte Jones, 164 U. S. 691.

Respectfully submitted,

THOMAS ARMSTRONG, Jr.,
Attorney for Defendant in Error.

P. H. HAYES,
Of Counsel.

INDEX

PAGES

STATEMENT OF FACTS..... 1-3

ARGUMENT 3

It is respectfully submitted that the Appeal should not be dismissed because the jurisdiction of the Circuit Court of Appeals did not depend entirely on diversity of citizenship, for the following reasons:

(a) The denial of the carrier's defense under the Interstate Commerce Act, based on the failure of shipper to give ten days' written notice of loss or damage, as required by the interstate bill of lading, was a denial of a federal right arising under the Constitution and laws of the United States, and so expressly recognized by this Court.

(b) The railroad carrier claimed by specific allegation, and attempted to prove, that the Federal Act regulating the hours of confinement of livestock in transit excluded it from a more prompt delivery of the shipment. This claim was denied by the District Court, and was expressly passed upon by the Circuit Court of Appeals. It is a federal question.

(c) It appears from Stewart's complaint and from all of the proceedings thereafter that his action was for damages to shipments which had moved interstate under interstate bills of lading, and therefore under the Carmack Amendment his cause of action is to be determined under federal statutes as construed by this Court.

STATUTORY PROVISIONS IN POINT..... 4

TO DETERMINE WHETHER A FEDERAL QUESTION IS INVOLVED THE ENTIRE RECORD WILL BE INSPECTED..... 5

(a) The denial of the carrier's defense under the Interstate Commerce Act, based on the failure of shipper to give ten days' written notice of loss or damage, as required by the Interstate Bill of Lading, was a denial of a federal right arising under the Constitution and laws of the United States and so expressly recognized by this Court..... 11

(b) The railroad carrier claimed by specific allegation, and attempted to prove, that the Federal Act regulating the hours of confinement of livestock in transit excluded it from a more prompt delivery of the shipment. This claim was denied by the District Court, and was expressly passed upon by the Circuit Court of Appeals. It is a federal question... 16

PAGES

(c) It appears from Stewart's complaint and from all of the proceedings thereafter that his action was for damages to shipments which had moved interstate under interstate bills of lading, and therefore under the Carmack Amendment his cause of action is to be determined under federal statutes as construed by this Court..... 16

THE MOTION TO DISMISS SHOULD BE DENIED 19

TABLE OF CASES AND STATUTES, ALPHABETICALLY ARRANGED:

	PAGES
Adams Express Co. vs. Croninger, 226 U. S. 491, 505, 506	17
Atchison, etc., Railway Co. vs. Robinson, 233 U. S. 173	17
Atchison, etc., Railway Co. vs. Harold, 241 U. S. 371	17
Boston & Maine R. R. vs. Hooker, 233 U. S. 97, 110	17
Cleveland & St. Louis R'y vs. Dettlebach, 239 U. S. 588	18
Chesapeake & Ohio R'y Co. vs. McLaughlin, 242 U. S. 142	11
Georgia, Florida & Alabama R'y Co. vs. Blish Milling Co., 241 U. S. 190	14-18
Grand Trunk Western R'y Co. vs. Lindsay, 233 U. S. 42	18
Hull vs. Burr, 234 U. S. 712, 720	5
Jones National Bank vs. Yates, 240 U. S. 541	18
Judicial Code, Sec. 128	4
Mallinckrodt Chemical Works vs. Missouri, 238 U. S. 41	7
Missouri, Kansas & Texas R'y Co. vs. Harriman Bros., 227 U. S. 657, 671-2	17
Northern Pacific Railway Co. vs. Wall, 241 U. S. 87	16
Norton vs. Whiteside, 239 U. S. 144	8
Phillips vs. Grand Trunk R'y, 236 U. S. 662, 667	13
Sage vs. Hampe, 235 U. S. 99	6
Seaboard Air Line vs. Duvall, 225 U. S. 477	18
Shapiro vs. United States, 235 U. S. 412	6
Southern Express Co. vs. Byers, 240 U. S. 612	19
Southern Railway vs. Prescott, 240 U. S. 630	15

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1916

SOUTHERN PACIFIC COMPANY, *Plaintiff in Error,* vs. FRANK R. STEWART, *Defendant in Error.*	No. 836.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS

Plaintiff in error respectfully opposes the motion to dismiss filed herein by the defendant in error.

STATEMENT OF FACTS

Frank R. Stewart, on July 1, 1913, shipped 152 cows from San Luis Obispo, California, to Phoenix, Arizona, billing them over the rails of Southern Pacific Company, an interstate carrier, and its connecting carrier the Arizona Eastern Railway

Company, the rails of which connect with those of the Southern Pacific Company at Maricopa in Arizona. These cows were shipped under three livestock bills of lading, fac-similes of which appear at pages 23, 25 and 27 of the Record.

Some of the cows died in transit; others were delivered at Phoenix in a damaged condition. Thereupon Stewart sued the Southern Pacific Company at law in the Superior Court of the County of Maricopa, Arizona (Complaint, Record p. 1). The Southern Pacific Company applied to and secured removal from the Circuit Court of Maricopa County to the District Court of the United States for the District of Arizona, on the ground of diversity of citizenship between plaintiff and defendant. (Defendant in Error's Brief on Motion to Dismiss Appeal, p. 3.)

Issue was joined, from which it appears, as will hereafter be shown, that the railroad carrier relied, among other things, on the Federal Act regulating the confinement of livestock in transit, and on the Interstate Commerce Act respecting the provision in the interstate bills of lading that claims for loss or damage thereunder must be presented in writing to the carrier within ten days after the unloading of the livestock.

In the United States District Court judgment in the sum of $2090 went for the plaintiff Stewart (Record p. 80), whereupon, on writ of error to the Circuit Court of Appeals for the Ninth Circuit, that judgment was affirmed, (Opinion of Circuit Court of Appeals, Record p. 251) whereupon a writ of error was sued out to this Court.

There is presently under consideration the motion of Stewart, as defendant in error in this Court, to dismiss the writ of error herein, on the grounds: (1) that the jurisdiction of the United States Circuit Court of Appeals was dependent entirely upon diversity of citizenship; (2) that the cause does not involve the construction or application of federal, constitutional or statutory provisions; and (3) that the Circuit Court of Appeals has certified no questions hereto.

ARGUMENT

IT IS RESPECTFULLY SUBMITTED THAT THE APPEAL SHOULD NOT BE DISMISSED BECAUSE THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS DID NOT DEPEND ENTIRELY ON DIVERSITY OF CITIZENSHIP, FOR THE FOLLOWING REASONS:

(a) The denial of the carrier's defense under the Interstate Commerce Act, based on the failure of shipper to give ten days' written notice of loss or damage, as required by the interstate bill of lading, was a denial of a federal right arising under the Constitution and laws of the United States, and so expressly recognized by this Court.

(b) The railroad carrier claimed by specific allegation, and attempted to prove, that the Federal Act regulating the hours of confinement of livestock in transit excluded it from a more prompt delivery of the shipment. This claim was denied by the District Court, and was expressly passed upon by the Circuit Court of Appeals. It is a federal question.

(c) It appears from Stewart's complaint and from all of the proceedings thereafter that his action was for damages to shipments which had moved interstate under interstate bills of lading, and therefore under the Carmack Amendment his cause of action is to be determined under federal statutes as construed by this Court.

Statutory Provisions in Point.

The writ of error sought to be dismissed was sued out under Section 241, Federal Judicial Code, providing that where the judgment of the Circuit Court of Appeals is not made final by the provisions of that title, there shall be of right an appeal or writ of error to this Court, where the matter in controversy shall exceed $1000 besides costs.

The only respects in which the judgment of the Circuit Court of Appeals is made final are those cases defined in Section 128 Judicial Code, namely, those in which the jurisdiction is dependent entirely upon the opposite parties being aliens and citizens of the United States, or citizens of different states, and cases arising under the patent, copyright, revenue and criminal laws, and in admiralty cases. In addition to those cases, under Section 3 of the Act of September 6, 1916, (1st Session 64th Congress, c. 448) the judgments and decrees of the circuit courts of appeal are final in proceedings and causes arising under the Bankruptcy, Federal Employers' Liability, Railroad Eighteen-Hour and Railway Safety Appliance Acts, saving the right of this Court to require certification to it of any case thereunder.

By the second paragraph of Section 3 of the Act of September 6, 1916, it is provided that a court having power to review a judgment or decree shall not dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but that when such mistake or error occurs it shall disregard the same and take the action which

would be appropriate if the proper appellate procedure had been followed.

Neither the Interstate Commerce Act nor the Federal Act regulating the hours of confinement of livestock in transit by a carrier is included within the Federal Acts as to which cases arising thereunder, or cases dependent on rights asserted thereunder, have the Circuit Court of Appeals as their court of last resort, subject to the exceptionally exercised reviewing power of this Court.

To Determine Whether a Federal Question is Involved the Entire Record Will Be Inspected.

In *Hull vs. Burr*, 234 U. S. 712, an appeal from the Circuit Court of Appeals for the First Circuit, it is said on page 720 (italics ours):

> "There is a motion to dismiss the appeal, based upon the ground that the jurisdiction of the District Court depended solely upon the diversity of citizenship, and that therefore the decree of the Circuit Court of Appeals is final, under §128, Judicial Code (36 Stat. 1133, c. 231). The motion must be granted unless the suit was one arising under the laws of the United States, within the meaning of the first subdivision of §24 of the Code. The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of some law of the United States, upon the determination of which the result depends. And this must appear not by mere inference, but by distinct averments according

> to the rules of good pleading; *not that matters of law must be pleaded as such, but that the essential facts averred must show, not as a matter of mere inference or argument, but clearly and distinctly, that the suit arises under some federal law. Hanford vs. Davies,* 163 U. S. 273, 279; *Mountain View Mining & Milling Co. vs. McFadden,* 180 U. S. 533, 535; *Defiance Water Co. vs. Defiance,* 191 U. S. 184, 191; *Arbuckle vs. Blackburn,* 191 U. S. 405, 413; *Bankers Casualty Co. vs. Minneapolis &c. Ry. Co.,* 192 U. S. 371, 383; *Shulthis vs. McDougal,* 225 U. S. 561, 569."

In *Sage vs. Hampe,* 235 U. S. 99, the exact form of pleading does not appear, but Mr. Justice Holmes says, with respect to a defendant who insisted that the judgment therein could not be rendered against him consistently with a given statute of the United States as construed by this Court:

> "*The defendant relied upon an Act of Congress as a defense, and is entitled to come to this Court.* *** The policy involved here is the policy of the United States. It is not a matter that the states can regard or disregard at their will."

In *Shapiro vs. United States,* 235 U. S. 412, it is said:

> "We cannot take the case in fragments, and if it is reviewable upon a direct writ of error by reason of the presence of a constitutional question, the whole case must come here."

In the case at bar it is said by counsel in their brief on motion to dismiss (p. 3) that:

> "The defendant in error admits the citizenship of Southern Pacific Company, and that its petition for removal did recite the diversity of citizenship of the plaintiff and the defendant."

In *Mallinckrodt Chemical Works vs. Missouri*, 238 U. S. 41, Mr. Justice Pitney says (p. 49):

> "There is a motion to dismiss, based upon the ground that the federal questions here set up were not raised in the trial court, or in the Supreme Court of the state, with sufficient definiteness to comply with §237, Judicial Code, (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1156). It appears, however, from the opinion of the Supreme Court (249 Mo. 704-733), that the question of equal protection under the Fourteenth Amendment was treated as being sufficiently raised, and was specifically dealt with and ruled against plaintiff in error. This is sufficient to confer jurisdiction upon this Court, and the motion to dismiss must be denied. *North Carolina Railroad vs. Zachary*, 232 U. S. 248, 257."

In the case at bar the Circuit Court of Appeals, speaking through Mr. Circuit Judge Gilbert, refers on page 253 of the printed record to the Federal Twentyeight-Hour Act, and denies the carrier relief thereunder. So also, beginning at page 256 of the record of the Circuit Court of Appeals' opinion, and extending to the end of the opinion, the question of the ten-day clause in the bill of lading, providing for written notice, is construed by the Circuit Court of Appeals and decided adversely to the carrier. In the carrier's briefs filed

with the Circuit Court of Appeals, reliance was squarely founded upon the Interstate Commerce Act, its effect on bill-of-lading contracts, and the decisions of this and lesser federal courts thereunder.

In *Norton vs. Whiteside*, 239 U. S. 144, while the appeal was dismissed for want of jurisdiction on the ground that it did not rest upon any assertion of federal right irrespective of diverse citizenship, nevertheless Mr. Chief Justice White proceeded to examine and analyze the bill to determine whether "the rights asserted rested in any degree whatever upon a substantial claim under the Constitution or laws of the United States, or by any possibility involved the construction or application of any law of the United States", and in so doing (page 151) discussed the legal grounds asserted as the basis of the relief prayed, and (page 153) the relief prayed. It is, we respectfully submit, apparent that if the legal grounds asserted had not been, as stated by the Chief Justice, those solely involving a question of state law long theretofore so decided by this Court, the appeal would not have been dismissed.

Applying the decisions of this Court and the federal statutes herein cited to the case at bar, it is apparent that diversity of citizenship was not the only ground upon which the jurisdiction of the District Court and the Circuit Court of Appeals depended; that the plaintiff counted upon an interstate shipment and that from the time the carrier first appeared in the case up to the present time it has constantly asserted immunity from the damages claimed, in reliance on the provisions of two

federal statutes, namely, the Interstate Commerce Act and the Act of June 29, 1906, regulating the confinement of livestock in transit. A brief review of the printed record here will, we respectfully submit, demonstrate that said statutes were so relied upon. The procedure followed in the District Court was that obtaining in the state courts in Arizona.

In defendant's second amended pleas and answer it is averred in its first plea in bar (Record p. 14) that the failure to unload the cattle, for loss of and damage to which the suit was brought, was enjoined upon the defendant by the Federal Act regulating confinement of livestock in transit, citing the title and date of the Act.

To defendant's second plea in bar, beginning on page 18 of the Record, there is attached the three interstate bills of lading issued in Philadelphia, for transportation of livestock to a point in Arizona. Copies of these bills are in the Record (pages 23, 25 and 27), and it is alleged in the second plea in bar (pp. 20-21) that by failure of the plaintiff to give the ten-day written notice prescribed by the bills of lading, plaintiff below had waived and released any claims on account of loss or damage to the livestock, a plea, as we shall show, cognizable federally, irrespective of state rules.

In the defendant's answer in the District Court (Record, p. 30) the Federal Livestock Act is again pleaded and relied upon, and on pages 34-36 the bills of lading provisions for notice are again referred to and relied upon. In paragraph 4 of the answer in the District Court (Record, p. 37) there is relied upon the fact that by the taking of

these contracts the plaintiff, Stewart, obtained a lower published tariff rate than otherwise would have been assessed, and in consideration thereof stipulated as to an agreed valuation on the cattle shipped.

The replies of the plaintiff, Stewart, traversed all of the allegations just referred to. So also does his answer (Record, p. 54). On the trial in the District Court for Arizona, as appears from the record, the question of the carrier's obligation under the Federal Livestock Law was gone into at length by a number of witnesses. Three instructions to the jury were requested and refused on the subject of interstate transportation of livestock and the Federal Act relative thereto (Record, pp. 148-9). The United States District Judge (p. 167) instructed the jury as to the Federal Livestock Statute, and also, as to the claim made by the carrier under the Interstate Commerce Act instructed the jury in effect (Record, p. 172) that the ten-day provision in the contract might be deemed to be waived by the *conduct* of the carrier.

In the Circuit Court of Appeals the carrier's assignments of error rely on the Federal Livestock Act (Record, p. 200 *et seq.*; Record p. 219) and on the ten-day-notice clause in the interstate bill of lading (Record, pp. 221, 223 and 224).

In the assignments of error filed in the Circuit Court of Appeals after judgment therein, the two statutes in question are again relied upon (Record, pp. 265 *et seq.*)

So, therefore, we respectfully submit that it clearly appears from the record in this case that the carrier's rights under two distinct federal stat-

utes have been consistently asserted by the defendant carrier since its first appearance in the District Court for Arizona, and moreover, that the Circuit Court of Appeals for the Ninth Circuit expressly recognized that fact by discussing those two questions and none other, and by predicating its opinion of affirmance on the grounds that the ten-day clause in the interstate bill of lading might be waived by conduct of the carrier and that the Federal Livestock Law was not a defense.

(a) The Denial of the carrier's defense under the Interstate Commerce Act, based on the failure of shipper to give ten days' written notice of loss or damage as required by the Interstate Bill of Lading, was a denial of a federal right arising under the Constitution and laws of the United States and so expressly recognized by this Court.

In *Chesapeake & Ohio Ry. Co. vs. McLaughlin*, 242 U. S. 142, a horse transported by the carrier from Kentucky to West Virginia had been injured. The shipment was under a uniform livestock contract and Bill of Lading signed by both parties, which provided:

> "That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier or sued for in any court by the said shipper, unless claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered at his office in Richmond, Va., within five days from the time said stock is removed from said car or cars; and that if any loss or damages

> occur upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs."

The shipping contracts and Bills of Lading in the case at bar (Record, p. 23) provide:

> "Second party hereby further agrees that in case any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss of damage will be made by second party on the Freight Claim Agent of first party in writing, within ten days after unloading of the livestock; and that in event of failure so to do, all claims for loss or damage in the premises are hereby expressly waived, released and made void, and it is also expressly agreed by second party that the amount to be by him claimed for each animal as described herein, so lost or damaged, shall be adjusted on basis of value at time and place of shipment, not exceeding the declared value as hereinbefore set forth, and on which declared value the rate or rates of transportation hereinbefore named by first party are based, and in no event is there to be any recovery from first party or its lessors for any loss of or damage to said livestock, from whatever cause arising, in excess of the declared value hereinbefore set forth."

The practical identity of the two provisions is apparent. In the *McLaughlin* case, *supra*, Mr. Justice McReynolds says:

> "It conclusively appears that McLaughlin did not present a verified claim to the carrier's

agent as provided by the contract. Upon its face the agreement seems to be unobjectionable, and nothing in the record tends to establish circumstances rendering it invalid or excuse failure to comply therewith. The court below erred in denying a seasonable request for a directed verdict; and its judgment must be reversed. Our recent opinions render unnecessary any further discussion of the reasons for this conclusion. *Northern Pacific Railway Co. vs. Wall*, 241 U.S. 87; *Georgia, Florida & Alabama Railway Co. vs. Blish Milling Co.*, 241 U. S. 190; *Cincinnati, New Orleans & Texas Pacific Railway Co. vs. Rankin*, 241 U. S. 319."

The railroad carrier in the case at bar had the right to insist under the federal statutes, as construed by this Court, that neither it nor its agents had power to waive, expressly or by conduct, the ten-day provision in the bill of lading. Its reliance therefore on that provision was reliance upon a federal right and confers jurisdiction upon this Court to review the decision of the Circuit Court of Appeals in respect to its holding that such provision had been waived by the conduct of the carrier.

As to the carrier's inability to waive such provi-

by law, and to treat all shippers alike, *would have made it illegal for the carriers, either by silence or express waiver*, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the Commerce Act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier."

In *Georgia, Florida & Alabama Railway Company vs. Blish Milling Company*, 241 U. S. 190, flour was shipped interstate under a bill of lading containing a provision that claims for loss, damage or delay must be made in writing to the carrier within four months after delivery, or, in case of failure to deliver, within four months after a reasonable time for delivery had elapsed, and that, unless claims were so made, the carrier should not be liable. The defense was overruled on the ground that written notice had been given by a series of telegrams, one of which specifically stated that claim was made for the invoice value of the flour. This Court, however, on the question of the ability of the carrier to waive the contract by conduct, said:

"It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. *But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement* made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. *Chicago & Alton R. Co. vs. Kirby*, 225 U. S. 153, 166; *Kansas Southern R'y Co. vs. Carl, supra; Atchison Topeka & Santa Fe Railway Co. vs. Robinson*, 233 U. S. 173, 181; *Southern R'y Co. vs. Prescott*, 240 U. S. 630. We are not concerned in the present case with any question save as to the applicability of the provision and its validity, and as we find it to be both applicable and valid, effect must be given to it."

Southern Railway vs. Prescott, 240 U. S. 630:

"It is also clear that, with respect to the service governed by the federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations." (Citing cases.) "This is the plain purpose of the statute, in order to shut the door to all contrivances in violation of its provisions against preferences and discrimination. ***

And the question as to responsibility under the bill of lading is none the less a federal one, because it must be resolved by the application of general principles of the common law." (Citing cases.)

In *Northern Pacific Railway Co. vs. Wall*, 241 U. S. 87, the view of the Montana courts, that the notice of claim for damages required by livestock contract might be waived by the carrier, is impliedly condemned by this Court, the decision, however, turning on the point that such notice may be given to a connecting carrier as well as to the initial carrier.

(b) The railroad carrier claimed by specific allegation, and attempted to prove, that the Federal Act regulating the hours of confinement of livestock in transit excluded it from a more prompt delivery of the shipment. This claim was denied by the District Court, and was expressly passed upon by the Circuit Court of Appeals. It is a federal question:

We have already shown that the Federal Act regulating confinement of livestock in transit was specifically pleaded by the carrier, and the defense thereunder denied by both the District Court and the Circuit Court of Appeals.

(c) It appears from Stewart's complaint and from all of the proceedings thereafter that his action was for damages to shipments which had moved interstate under interstate bills of lading, and therefore under the Carmack Amendment his cause of action is to be determined under federal statutes as construed by this Court.

Irrespective of the proceedings herein subsequent to the filing of Stewart's complaint, it clearly appears from that complaint that the action is federal in character and is to be determined upon the prin-

ciples enunciated by this Court in its construction of the Carmack Amendment.

Stewart's complaint states that the defendant is an interstate rail carrier (Record, p. 1); that the shipments were interstate (Record, pp. 1, 2); and that the shipments were made under tariffs "published and on file with the Interstate Commerce Commission" (Record, p. 2).

In *Atchison &c. Railway Co. vs. Harold*, 241 U. S. 371, it is held that the Carmack Amendment, being an assertion of the power of Congress over the subject of interstate shipments, the duty to issue bills of lading, and the responsibilities thereunder made the passage of the amendment action by Congress in regard to such subjects, and necessarily excluded state action in regard thereto, the prime object of the Carmack Amendment being to bring to a uniform rule the responsibility as to interstate commerce and interstate bills of lading.

In the *Harold* case the Court denied a motion to dismiss a writ of error to the Supreme Court of the State of Kansas, in a case wherein suit against the Santa Fe was commenced by a shipper to recover loss suffered by alleged unreasonable delay in delivery of an interstate shipment. In so doing the Court referred to the following cases:

Adams Express Co. vs. Croninger, 226 U. S. 491, 505, 506;

Missouri, Kansas & Texas R'y vs. Harriman Bros., 227 U. S. 657, 671-2;

Boston & Maine R. R. vs. Hooker, 233 U. S. 97, 110;

Atchison Topeka & Santa Fe R'y vs. Robinson, 233 U. S. 173, 180;

Cleveland & St. Louis R'y vs. Dettlebach, 239 U. S. 588;
Georgia, Florida & Alabama R'y vs. Blish Milling Co., 241 U. S. 190.

In cases arising under the Federal Employers' Liability Act this Court has held in *Grand Trunk Western R'y Co. vs. Lindsay*, 233 U. S. 42, and in *Seaboard Air Line vs. Duvall*, 225 U. S. 477, that the operation and effect of the Employers' Liability Act upon the rights of the parties is involved in an action for negligence where the complaint alleges and the proof establishes that the employee was negligent in and the injury occurred in the course of interstate commerce, even though the Act was not referred to in the pleadings nor pressed at the trial.

In *Jones National Bank vs. Yates*, 240 U. S. 541, action was brought by unpaid depositors against National Bank directors to recover damages for false representations of the bank's condition. The defendants pleaded that their liability, if any, was to be determined by the provisions of the National Bank Act. It is said by this Court (p. 550):

> "It is insisted that the writs should be dismissed in the view that the plaintiffs in error sought to enforce liability upon non-federal grounds, and that the federal question was raised exclusively by the defendants in error. But this objection ignores the nature of the plaintiffs' case. The fact that their petitions did not refer, in terms, to the federal statute is not controlling."

Southern Express Co. vs. Byers, 240 U. S. 612.

This was an action in a state court for damages for failure to deliver a casket shipped interstate. The express company defended on the ground that the bill of lading limited the liability to $50. The state court applied the state statute prescribing the measure of damages, which judgment was reversed because, as this Court said:

> "Manifestly the shipment was interstate commerce; and under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon Acts of Congress, the bill of lading, and common-law principles accepted and enforced by the federal court."

Wherefore we take it that the instant case was federal in character from its inception.

The Motion to Dismiss Should Be Denied.

It is therefore respectfully submitted that under Section 128 of the Judicial Code the decision of the Circuit Court of Appeals was not final, as shown not only by the foregoing argument but also was not so in the opinion of the Court itself as evidenced by its allowance of a writ of error.

Respectfully submitted.

HENLEY C. BOOTH,
828 Flood Building,
San Francisco, California.
Attorney for Petitioner.

WILLIAM F. HERRIN,
Of Counsel.

-14-
See 245 U.S. 339 - 51 L. Ed. 837

OFFICE OF THE CLERK
RECEIVED
JAN 17 1918
SUPREME COURT U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1917.

SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,
vs.
FRANK R. STEWART.

No. [redacted]89

Petition for Rehearing

HENRY C. BOOTH,
A. A. HOEHLING,
WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for the Southern Pacific Company.

WILLIAM F. HERRIN,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1917.

SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,
vs.
FRANK R. STEWART.
No. 348.

PETITION FOR REHEARING.

Now comes the Southern Pacific Company, plaintiff in error, and prays for a rehearing in this case, and for grounds of this petition says:

The opinion and judgment of this court, rendered December 17, 1917, dismissing this case for want of jurisdiction, were based upon the single ground that the removal of the case from the Superior Court of the State of Arizona in and for the County of Maricopa, to the United States District Court for the District of Arizona, "was upon a petition resting *solely* on the ground of diverse citizenship," the court finding that "the jurisdiction of the federal court was invoked *solely* on that ground." In its said opinion this court said that the complaint "contained a cause of action arising under a federal statute" and that the case was removable on that ground also, but held that the judgment of the Circuit Court of Appeals was final because the petition for removal from the State court failed to set up the federal ground.

We hereby respectfully show the court that it was in error in holding that this case was removed from

the State court *solely* upon the ground of diverse citizenship, as the petition for removal did set up and urge as a ground of removal the fact that the case arose under the Interstate Commerce Acts, the second ground of said petition being as follows (italics ours):

"II.

"That the suit is of a civil nature at law of which the District Courts of the United States have original jurisdiction. That the said action is brought by plaintiff to recover of defendant damages in the sum of three thousand, six hundred ninety-five dollars for alleged loss and injury to a certain shipment of cattle, made by plaintiff on or about the first day of July, 1913, from the town of San Luis Obispo, State of California, over the line of railroad operated by the defendant company and over its connecting carriers to the City of Phoenix, in the State of Arizona; *and that said suit arises under the laws of the United States, to-wit: an Act of Congress entitled "An Act to Regulate Commerce", approved February 4, 1887, and the several Acts of Congress amendatory thereof and supplemental thereto.*"

Annexed to the original of this petition for rehearing is a duly certified copy of the petition for removal from the State court and of the order of removal issued thereon. Said petition and order are also hereinafter printed in full, together with the certificate of the Clerk of the United States District Court as to the correctness of said copies.

It is to be noted that the Transcript of the Record in this court did not contain the petition or order of removal from the State court or any reference to the removal proceedings.

In arriving at the conclusion that the sole ground for the removal of the case from the State court was the diverse citizenship of the parties, this court presumably relied upon the statements in the Motion to Dismiss filed by the defendant in error, wherein it was alleged that the jurisdiction of the Circuit Court of Appeals "was dependent entirely upon the plaintiff and defendant in error being citizens of different States," and the "admission" in the Argument of counsel for defendant in error, printed with said Motion to Dismiss (p. 3), that the petition for removal "did recite the diversity of citizenship of the plaintiff and defendant;" and also upon the statement in the Brief for plaintiff in error in opposition to the Motion to Dismiss (p. 2), that the Southern Pacific Company applied to and secured the removal of the case from the State court "on the ground of diversity of citizenship between plaintiff and defendant," said Brief citing in this connection defendant in error's said "admission", on page 3 of his Motion to Dismiss, that the petition for removal did recite the diversity of citizenship of the plaintiff and defendant.

It is apparent that the writer of plaintiff in error's Brief in opposition to the Motion to Dismiss did not have before him the petition for removal from the State court (which, as stated, is not in the Transcript of the Record), and was misled by defendant in error's "admission" as to what the petition for removal showed, and assumed (as this court very naturally assumed in its opinion of December 17, 1917, in the absence of anything in the Record on the subject,) that diversity of citizenship was the *only* ground of removal set up in the petition for removal. As the certified copy of the petition for removal filed herewith clearly shows, how-

ever, this assumption is erroneous and the federal ground for removal was fully and distinctly set up in said petition.

Wherefore, with apologies for the inadvertence of counsel which led the Court into error, it is respectfully prayed that the judgment of dismissal may be set aside and the case reinstated.

A copy of this petition has been mailed counsel for defendant in error.

Respectfully submitted,

HENRY C. BOOTH,
A. A. HOEHLING,
WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for the
Southern Pacific Company.

WILLIAM F. HERRIN,
Of Counsel.

We hereby certify that in our opinion the foregoing petition is well founded in law and fact and not made for delay.

A. A. HOEHLING,
WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for the
Southern Pacific Company.

(Petition for Removal from the State Court.)

IN THE

SUPERIOR COURT OF THE STATE OF ARIZONA,

IN AND FOR THE COUNTY OF MARICOPA.

Frank R. Stewart, Plaintiff, *vs.* Southern Pacific Company, a corporation, Defendant.	Defendant's Petition for removal to United States District Court.

To the Honorable, the Superior Court of the State of Arizona, in and for the County of Maricopa:

Now comes the Southern Pacific Company, a corporation, defendant above named, and files this its petition for removal of the above-entitled cause from the aforesaid Superior Court of the State of Arizona, in and for the County of Maricopa, in which it is now pending, to the United States District Court for the District of Arizona, at the City of Phoenix, in said District and State.

Petitioner would show to your Honorable Court:

I.

That this cause was filed in your Honorable Court on or about the 2nd day of July, 1915: that summons in said action was served upon defendant, Southern Pacific Company, a corporation, on the 3rd day of July, 1915, and that the time to file its answer or demur to same has not yet expired under the laws of this State in such cases made and provided.

II.

That the suit is of a civil nature at law of which the District Courts of the United States have original jurisdiction. That the said action is brought by plaintiff to recover of defendant

damages in the sum of three thousand, six hundred ninety-five dollars for alleged loss and injury to a certain shipment of cattle, made by plaintiff on or about the first day of July, 1913, from the town of San Luis Obispo, State of California, over the line of railroad operated by the defendant company and over its connecting carriers to the City of Phoenix, in the State of Arizona; and that said suit arises under the laws of the United States, to-wit: an Act of Congress entitled "An Act to Regulate Commerce", approved Feb. 4, 1887 and the several Acts of Congress amendatory thereof and supplemental thereto.

III.

That the matter in controversy in said suit, exclusive of interest and costs, exceeds the sum of three thousand dollars.

IV.

That the said action is wholly between citizens of different states.

V.

That your petitioner, the said Southern Pacific Company, the defendant in said action, is now and was at the time of the commencement of said action and ever since has been a corporation duly organized, created by and existing under and by virtue of the laws of the State of Kentucky, and is now and was at the time of the commencement of said action and ever since has been a resident and a citizen of the State of Kentucky and a non-resident of the State of Arizona; and that defendant was not at the time of the commencement of said action and is not now and never has been a citizen of the said State of Arizona.

VI.

That the said Frank R. Stewart, the plaintiff in said action was at the time of the commencement of this action, ever since

has been and now is a citizen and resident of the State of Arizona, and was not at any of said times and is not now a citizen or a resident of the said State of Kentucky, but at all of said times has been and now is a non-resident of the State of Kentucky.

VII.

Your petitioner files herewith a good and sufficient bond under the statute in such cases made and provided, conditioned as the law directs and that it will within thirty days from the filing of the petition for removal file a certified copy of the record in the case in the United States District Court for the District of Arizona, at Phoenix, in said district, and for the payment of all costs which may be awarded by said court if the said District Court shall determine that this suit was improperly or wrongfully removed thereto.

Your petitioner therefore prays the court that it proceed no further herein except to order the removal and accept the bond herein presented and direct a transcript of the record to be made and certified as provided by law.

FRANCIS M. HARTMAN,
J. C. FOREST,
Attorneys for Defendant.

STATE OF ARIZONA,
COUNTY OF PIMA } *ss:*

T. H. Williams being first duly sworn deposes and says: That he is Superintendent of the Southern Pacific Company, the defendant named in the above entitled action. That he has read the foregoing petition for removal and knows the contents thereof, and that same is true in substance and in fact, of his own knowledge, except as to matters and things therein stated on information and belief, and as to such matters and things he believes it to be true. That this verification is made by affiant as Superintendent for the reason that petitioner is a corporation.

T. H. WILLIAMS.

Subscribed and sworn to before me this 6th day of July, 1915. My commission expires February 19, 1916.

R. W. LANGWORTHY,
(SEAL) *Notary Public, Pima Co., Arizona.*

Endorsed:
No. 8603.

Copy recd. July 8th, 1915.
HAYES & LANEY, Attorneys for Plaintiff.

Filed at 10:15 A. M., July 9-1915.
JAMES MILLER, JR., Clerk.
By J. ELMER JOHNSON, Deputy.

(*Order of Removal.*)

IN THE

SUPERIOR COURT OF THE STATE OF ARIZONA,

IN AND FOR THE COUNTY OF MARICOPA.

Frank R. Stewart, Plaintiff,
vs.
Southern Pacific Company, a corporation, Defendant. } Order on Removal.

This cause coming on to be heard on the 14th day of July, A. D. 1915, upon the application of Southern Pacific Company, a corporation, defendant herein, for an order transferring this cause to the United States District Court for the District of Arizona, and it appearing to the Court that said defendant has filed its bond duly conditioned, with good and sufficient sureties, as required by law, and it appearing to the Court that this is a proper cause for removal to the District Court of the United States: *Now, therefore,*

IT IS HEREBY ORDERED, That the said cause be and it is hereby removed to the United States District Court for the District of Arizona, at Phoenix, Arizona, forthwith.

Done in open court, this 14th day of July, A. D. 1915.

FRANK H. LYMAN,
Superior Judge.

Endorsed: No. 8603.

Copy recd. July 8th, 1915. HAYES & LANEY, Attorneys for Plaintiff.

Filed July 14, 1915.
JAMES MILLER, JR., Clerk.
By J. ELMER JOHNSON, Deputy.

The Transcript, of which the foregoing Petition for Removal and Order on Removal are a part, is endorsed: "Filed July 23, 1915. GEORGE W. LEWIS, Clerk. By AILEEN RUSSELL, Deputy."

(Certificate of Clerk of United States District Court.)

UNITED STATES OF AMERICA }
DISTRICT OF ARIZONA } *ss:*

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing, consisting of four typewritten pages, is a full, true and complete copy of the Petition for Removal and Order on Removal in the case of *Frank R. Stewart, Plaintiff* vs. *Southern Pacific Company, a corporation, Defendant*, No. 142 (Phoenix), as the same appear from the original Transcript of the same remaining in my office.

WITNESS my hand and the seal of said Court affixed at Phoenix, Arizona, this 4th day of January, A. D. 1918.

(OFFICIAL SEAL)

MOSE DRACHMAN, Clerk,
By NAT. T. MCKEE, Deputy Clerk.

INDEX.

	Page
STATEMENT OF FACTS	1
ASSIGNMENTS OF ERROR	4
ARGUMENT	6
It was incompetent for the carrier to waive the contract provision in the bills of lading requiring notice in writing of any claim or demand for loss or damage within ten days after unloading at destination	6
For its protection, the carrier was entitled to have the notice provided for in the bills of lading given to that official whose duty it was to examine into the circumstances surrounding the alleged negligence	11
Having expressly assumed all risk of loss or damage due to heat or climatic conditions, the shipper should not be allowed to recover for loss or damage admittedly due to the heat	14
CONCLUSION	15

TABLE OF CASES.

Chesapeake & Ohio Railway Co. vs. McLaughlin, 242 U. S., 142	9
Clegg vs. St. Louis & San Francisco Railway Co., 203 Fed., 971	10
Erie Railroad Co. vs. Stone, 244 U. S., 332	13
Georgia, Florida & Alabama Railway Co. vs. Blish Milling Co., 241 U. S., 190	7
Northern Pacific Railway Co. vs. Wall, 241 U. S., 87	9
Phillips vs. Grand Trunk Railway, 236 U. S., 662-667	7
Southern Pacific Co. vs. Frank R. Stewart, 245 U. S., 339; 245 U. S., 562	4
Southern Railway vs. Prescott, 240 U. S., 630	8
St. Louis, Iron Mountain & Southern Railway Co. vs. Starbird, 243 U. S., 592	12

IN THE

Supreme Court of the United States

October Term, 1918.

SOUTHERN PACIFIC COMPANY,
Plaintiff in error,
vs.
FRANK R. STEWART,
Defendant in error.

No. 89.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

The plaintiff below, Frank R. Stewart, sued for loss of and damage to certain live stock shipped over the rails of the Southern Pacific Company, an Interstate carrier, and its connecting carrier, the Arizona Eastern Railroad Company, from San Luis Obispo, in California, to Phoenix, in Arizona, in the early part of July, 1913. The live stock was shipped under *Live Stock Shipping Order Contracts and Bills of Lading,* which provided as follows:

> "Second party hereby further agrees that in case any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by second party on the Freight

Claim Agent of first party in writing, within ten days after unloading of the live stock; and that in event of failure so to do, all claims for loss or damage in the premises are hereby expressly waived, released and made void, and it is also expressly agreed by second party that the amount to be by him claimed for each animal as described herein, so lost or damaged, shall be adjusted on basis of value at time and place of shipment, not exceeding the declared value as hereinbefore set forth, and on which declared value the rate or rates of transportation hereinabove named by first party are based, and in no event is there to be any recovery from first party or its lessors for any loss of or damage to said live stock, from whatever cause arising in excess of the declared value hereinbefore set forth." (Record, pp. 23-28).

The shipper likewise expressly assumed, in the bills of lading, "all risk of loss or damage of or to said live stock or to the persons who may be in charge thereof, or which the animals may occasion themselves or each other, and all loss or damage resulting from heat, suffocation or climatic conditions," etc. (Record, pp. 23-28).

The shipper alleged that the company negligently unloaded the animals at Yuma, on July 4, 1913, when the weather was extremely hot, and placed them in pens unprotected from the sun instead of transporting them through to their destination. To this the carrier answered that at the time when the cattle arrived at Yuma they had been confined in the cars for about twenty hours without feed, water or rest, and that it was necessary to unload them at that point, in order to comply with the provisions of the Act of Congress, approved June 29, 1906, commonly known as the Twenty-eight Hour Law (*34 Stat. 607*).

It is admitted, (Record, p. 85) that the shipper did not give to the carrier written notice of his claim for loss and damage within ten days after unloading at destination, as

provided in the bills of lading from which quotation is made, *supra*. But the shipper insists that he was relieved from compliance with the provision in respect of such notice by the facts that (in the words of Circuit Judge Gilbert, in the opinion of the Court of Appeals) "on July 4, 1913, and at all times subsequent thereto, the defendant (carrier) had full knowledge and notice of the injuries and damage to the plaintiff's (shipper's) cattle; that prior to reloading the cattle on that day, five of them had died; that the defendant found it necessary to provide an additional car in which to reload thirteen of the crippled and sick cattle; that at various points between Yuma and Phoenix the train officials in charge of the shipment received telegraphic inquiries from other officials of the defendant inquring as to the condition of the cattle; that after arrival at Phoenix one of the crippled animals remained in the defendant's car for more than a week; that from the unloading of the shipment at Phoenix until October 21st of that year the plaintiff and the agents of the defendant were almost daily in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the cattle which arrived alive were such as to render it impossible to determine the amount and extent thereof within the ten day period; that a number thereof died many days after their arrival at Phoenix, as a result of such injuries, and that the defendant on many occasions prior to October 21st recognized the plaintiff's right to recover on account of his damages." (Record, pp. 256-257).

Stewart sued the Southern Pacific Company at law in the Superior Court of the County of Maricopa, Arizona (Complaint, Record p. 1). The Southern Pacific Company applied to and secured removal from the Circuit Court of Maricopa County to the District Court of the United States for the District of Arizona, on the ground of diversity of

citizenship between plaintiff and defendant, and also on the ground that the suit arose under the laws of the United States, to wit: An Act of Congress, entitled, "An Act to Regulate Commerce," approved February 4, 1887, and the several Acts of Congress amendatory thereof, and supplemental thereto.

Issue was joined, from which it appears that the railroad carrier relied, among other things, on the Federal Act regulating the confinement of live stock in transit, and on the Interstate Commerce Act respecting the provision in the interstate bills of lading that claims for loss or damage thereunder must be presented in writing to the carrier within ten days after the unloading of the live stock.

In the United States District Court judgment in the sum of $2090 went for the plaintiff Stewart (Record p. 80), whereupon, on writ of error to the Circuit Court of Appeals for the Ninth Circuit, that judgment was affirmed (Opinion of Circuit Court of Appeals, Record p. 251), whereupon a writ of error was sued out to this Court.

Motion to dismiss was filed by the defendant in error, which was first sustained by the Court, (*245 U. S. 339*), but subsequently, on petition for rehearing, the order for dismissal was set aside and the case restored to the docket (245 U. S. 562).

Assignments of Error.

The assignments of error are set out in full in the Record (pp. 265 et seq.), and need not be repeated here at length. They are nevertheless insisted upon in this Court, and, for the purpose of this brief, may be summarized as follows:

1. It was error to hold that the jury might find, from the evidence, that the railroad company, by its conduct or that of its agents, had waived the provisions of the bills of

lading, requiring that demand or claim for any loss or damage shall be made by the shipper, in writing, within ten days after unloading of the live stock.

2. It was error to hold that the railroad company, by its conduct, or by oral statements or otherwise, could legally waive or dispense with the aforesaid provision that written notice of any claim for loss or damage be given to the carrier within ten days after the unloading of the live stock at destination.

3. It was error to hold that compliance by the shipper with the aforesaid provision in respect of written notice of claim for loss and damage had been or could legally be excused.

4. It was error to refuse to instruct the jury that if the shipper knew, or could have known, by the exercise of reasonable diligence, within ten days after unloading the animals at destination, that a certain portion of the animals were injured, and he did not, within ten days after unloading said animals at destination, make written claim or demand upon the railroad company or any of its agents for such alleged loss or damage, then he could not recover for such alleged loss or damage.

5. It was error to refuse to grant the motion made by plaintiff in error, defendant below, for a directed verdict in its favor, for the following reasons, among others:

> (1) That it was necessary for plaintiff in error to unload the cattle at Yuma in order to comply with the Federal Act known as "The Twenty-Eight Hour Law," and that defendant in error is basing his claim for damages upon the fact that the cattle were unloaded at Yuma instead of transporting them on to Phoenix, Arizona, their destination.
>
> (2) That the undisputed testimony showed that prior to or at about the time the cattle were shipped from San Luis Obispo, California, defendant in error

made and entered into a contract in writing with plaintiff in error, wherein and whereby defendant in error specifically agreed that plaintiff in error should not be liable for any loss, injury or damage to said live stock resulting from heat or climatic conditions; and

That the undisputed evidence showed that if any loss, injury or damage occurred to said cattle, the same was due solely and entirely to the heat and climatic conditions existing at the time at Yuma, Arizona.

(3) That the undisputed evidence showed that there was no negligence whatever on the part of plaintiff in error, defendant below, in the handling and transportation of said cattle.

ARGUMENT.

One question of primary importance stands out in the consideration of this case, the question of the provision in the bills of lading in respect of written notice, and the alleged waiver thereof. Without waiving any of the other defenses set up by the railroad company, it is believed that this question is so controlling that this argument will be chiefly directed thereto.

IT WAS INCOMPETENT FOR THE CARRIER TO WAIVE THE CONTRACT PROVISION IN THE BILLS OF LADING REQUIRING NOTICE IN WRITING OF ANY CLAIM OR DEMAND FOR LOSS OR DAMAGE WITHIN TEN DAYS AFTER UNLOADING AT DESTINATION.

This question has been before this Court in a number of decided cases. In the view of the matter taken by counsel, it is immaterial what knowledge the carrier had of the condition of the shipment, and when or how that knowledge was obtained (so long as it was not gained from the notice required by the bills of lading); it is immaterial what the carrier did to save the shipper from loss; and the confer-

ences between the shipper and the carrier, alleged to have begun before the expiration of the ten day period, are likewise wholly immaterial. If, because of controlling reasons of public policy, the carrier is not permitted to waive such a notice, because to permit such waivers would open the door to discrimination both for and against shippers, then the Courts below, for the same reasons of public policy, have no power to enforce such waiver either on the theory of waiver or estoppel. We respectfully submit that the decisions of this Court on this point have been uniform.

In the case of *Phillips vs. Grand Trunk Railway*, (236 U. S. 662, 667); this Court said:

> "The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, *would have made it illegal for the carriers, either by silence or express waiver,* to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the Commerce Act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier." (Italics by counsel.)

In *Georgia, Florida & Alabama Railway Company vs. Blish Milling Company*, (241 U. S. 190), flour was shipped

interstate under a bill of lading containing a provision that claims for loss, damage or delay must be made in writing to the carrier within four months after delivery, or, in case of failure to deliver, within four months after a reasonable time for delivery had elapsed, and that, unless claims were so made, the carrier should not be liable. The defense was overruled on the ground that written notice had been given by a series of telegrams, one of which specifically stated that claim was made for the invoice value of the flour. This Court, however, on the question of the ability of the carrier to waive the contract by conduct, said:

> "It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. *But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement* made under the published tariffs and regulations. (Italics by counsel). A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. *Chicago & Alton R. Co. vs. Kirby,* (225 U. S. 153, 166); *Kansas Southern R'y Co. vs. Carl,* (*supra*); *Atchison, Topeka & Santa Fe Railway Co. vs. Robinson,* (233 U. S. 173, 181); *Southern R'y Co. vs. Prescott,* (240 U. S. 630). We are not concerned in the present case with any question save as to the applicability of the provision and its validity, and as we find it to be both applicable and valid, effect must be given to it."

And, as was said in *Southern Railway vs. Prescott,* (240 U. S. 630):

"It is also clear that, with respect to the service governed by the federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations." (Citing cases.) "This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discrimination. ***

And the question as to responsibility under the bill of lading is none the less a federal one, because it must be resolved by the application of general principles of the common law." (Citing cases).

In *Northern Pacific Railway Co. vs. Wall,* (241 U. S. 87), the view of the Montana courts, that the notice of claim for damages required by live stock contract might be waived by the carrier, is impliedly condemned by this Court, the decision turning on the point that such notice may be given to a connecting carrier as well as to the initial carrier.

In the case of *Chesapeake & Ohio Ry. Co. vs. McLaughlin,* (242 U. S. 142), a horse transported by the carrier from Kentucky to West Virginia had been injured. The shipment was under a uniform live stock contract and Bill of Lading signed by both parties which provided:

"That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier or sued for in any court by the said shipper, unless claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered at his office in Richmond, Va., within five days from the time said stock is removed from said car or cars; and that if any loss or damages occur upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs."

The practical identity of this provision with that in the instant case (pp. 1 and 2, *supra*), is apparent. In the McLaughlin case, from which the foregoing provision is taken, Mr. Justice McReynolds says:

> "It conclusively appears that McLaughlin did not present a verified claim to the carrier's agent as provided by the contract. Upon its face the agreement seems to be unobjectionable, and nothing in the record tends to establish circumstances rendering it invalid or excuse failure to comply therewith. The court below erred in denying a seasonable request for a directed verdict; and its judgment must be reversed. Our recent opinions render unnecessary any further discussion of the reasons for this conclusion. *Northern Pacific Railway Co. vs. Wall,* (241 U. S. 87); *Georgia, Florida & Alabama Railway Co. vs. Blish Milling Co.,* (241 U. S. 190); *Cincinnati, New Orleans & Texas Pacific Railway Co. vs. Rankin,* (241 U. S. 319)."

The case of *Clegg vs. St. Louis & San Francisco Railway Company, C. C. A., 8th Circuit,* (203 Fed. 971), was an action to recover damages for delay in delivering cattle shipped interstate under a live stock contract. The answer set up that the notice provided for in the contract was not given. Plaintiff sought to avoid failure to give notice by pleading that the General Freight Claim Agent, who had full authority to handle and adjust all freight claims, received notice of plaintiff's claim without objection as to the time of presentation, or the manner and form thereof, and that he negotiated with the plaintiff, both orally and in writing, on the subject of such claim, and that by reason thereof the defendant waived the notice provision. Says the Court:

> "We are clearly of the opinion that the eleventh provision in the contract above quoted, relative to giving notice, was a valid one, and the failure to give the no-

tice fatal to defendant's right to recover." (Citing cases).

"The provision in the contract that no agent of the company had any authority to waive, modify or amend any of the provisions of the contract, was also a valid provision, and the action of Leith, General Freight Claim Agent of the defendant, in simply negotiating with the plaintiff, was not a waiver of that provision of the contract."

In the case at bar we have merely: 1st, whatever knowledge the Southern Pacific Company had of the death of five of the cattle, and the condition of the remainder; 2nd, inquiry by the conductor on instructions by unnamed superiors; 3rd, conversations with agents of the Arizona Eastern Railroad, in which a claim for damages was orally asserted; 4th, conversation or conversations with an unidentified person who said that he was a claim agent of the Southern Pacific Company; 5th, the first service of written, formal notice by letter of October 2, 1913, nearly three months after the shipment moved. These surely can not be held to constitute a waiver or release.

FOR ITS PROTECTION, THE CARRIER WAS ENTITLED TO HAVE THE NOTICE PROVIDED FOR IN THE BILLS OF LADING GIVEN TO THAT OFFICIAL WHOSE DUTY IT WAS TO EXAMINE INTO THE CIRCUMSTANCES SURROUNDING THE ALLEGED NEGLIGENCE.

The provisions of the bill of lading required that written notice be given to the Freight Claim Agent of the carrier within the ten day period. The reasonableness and propriety of such a provision is apparent. It is the Claim Agent's department which must investigate the facts and circumstances surrounding such a case, and examination must be made of

the actual shipment, as well of the attendant circumstances, as soon as reasonably may be. So a statement to any other agent or employee by the shipper that he has, or intends to present, a claim for loss or damage, is not notice to the proper official or sufficient to constitute notice complying with the bill of lading provision.

In this connection, attention is respectfully called to the case of *St. Louis, Iron Mountain & Southern Railway Co. v. Starbird,* (243 U. S. 592).

This was an action to recover for negligence on the part of the carrier in failing to properly refrigerate certain carloads of peaches. The shipment was interstate and the bill of lading contained the following stipulation:

> "claims for damages must be reported by consignee, in writing, to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice is not there given, neither this Company nor any of the connecting or immediate carriers shall be liable."

This Court agreed with the State Court that the stipulation was a reasonable one, and further held, overruling the State Court, that verbal notice to the superintendent of the dock of the Pennsylvania Company, given within the required time, was not a compliance with the terms of the contract.

The Court further said:

> "It is true that the record contains testimony tending to show that it would take more than thirty-six hours to separate the good peaches from the bad, and to re-crate and sell the good ones. But the bill of lading in this case only requires that 'claims for damages must be *reported* by the consignee, in writing, to the delivering line' within the time named. This bill of

> lading contained no stipulation requiring a specific claim to be filed within thirty-six hours fixing the amount of damages to be claimed. It was entirely consistent with this requirement, on discovery of the bad condition of the peaches, to have given notice within the time stipulated of the intention to make a claim for damages, although the exact amount of the claim might not have been ascertained. This would have given an opportunity for the delivering carrier to make the examination which it was the principal purpose of the stipulation to afford. *Northern Pacific Ry. Co. v. Wall, (supra); St. Louis &c. R. R. Co. v. Keller,* (90 Arkansas, (308, 313)."

So, here, in the instant case, there is nothing in the bill of lading requiring a "specific" claim to be filed, "fixing the amount of damages to be claimed." It would have been entirely consistent for the shipper to have given written notice of the claim within the time specified, although the exact amount might not then have been ascertained. But it was *written notice* to the Freight Claim Agent that was specified in the contract, and it was such written notice to which the carrier was entitled, so that it might have a definite basis on which to work, but it is admitted by the defendant in error that such written notice was not given until nearly three months had elapsed. (Record, p. 85).

In the case of *Erie R. R. Co. vs. Stone,* (244 U. S. 332), the defendants in error brought suit to recover damages to certain horses shipped under bills of lading hereinafter referred to, and recovered a judgment in the court of original jurisdiction, which was affirmed by the Court of Appeals of Crawford County, Ohio. The case was brought to the Supreme Court of the United States by writ of error. The horses were shipped under a contract designated "Limited Liability Live Stock Contract" which contained a stipulation that no claim for damages which may accrue to the

shipper shall be allowed or paid by the carrier unless a claim for such loss or damage be filed with the carrier's agent in writing within five days from the time of removal of the stock from the car.

Mr. Justice Day, delivering the opinion of the Court, says:

> "This case requires little discussion, as the principles governing it have been settled by frequent decisions of this Court. We need not stop to consider whether the requirement of the live stock contract that a claim for damages should be presented within five days from the time the stock was removed from the cars was reasonable or not, for this question has been answered in favor of the reasonableness of such stipulation in the recent case of *Northern Pacific Ry. Co. v. Wall*, (241, U. S. 87). See also *St. Louis Iron Mountain & Southern Ry. Co. v. Starbird*, (243 U. S. 592).
>
> "In the case under consideration it appears that the reduced rates under which these horses were shipped and the limited liability arising from shipping under such reduced rates were fixed by the tariff schedules and the form of limited liability contract duly published and filed with the Interstate Commerce Commission, as required by law. These rates and that contract which contained the notice requirement thus became binding upon the parties until changed by order of the Commission."

HAVING EXPRESSLY ASSUMED ALL RISK OF LOSS OR DAMAGE DUE TO HEAT OR CLIMATIC CONDITIONS, THE SHIPPER SHOULD NOT BE ALLOWED TO RECOVER FOR LOSS OR DAMAGE ADMITTEDLY DUE TO THE HEAT.

The plaintiff below expressly assumed all risk of loss or damage due to heat or climatic conditions when he entered into the contract of shipment evidenced by the bill of lading.

By the provisions of the Act of Congress of June 29, 1906, (34 Stat. 607), referred to above as "The Twenty-eight Hour Law," the carrier was required to furnish properly equipped pens for rest, water and feeding. That statute is a criminal statute, and, as between the Government and the carrier, the question of whether the pens provided for the unloading and resting of live stock were properly equipped might become important, but, as between the shipper and the carrier, it is respectfully submitted that it was not material if the pens were protected from the sun, because the shipper had assumed all risk of loss or damage due to heat. He knew he was shipping the cattle through and to a hot, dry part of the country, at a time of the year when the heat was likely to be excessive, and in view of his assumption of the risk, he should not be heard to complain of the loss and damage to his cattle caused by the heat. We submit that it was erroneous to charge the jury that it was for them alone to determine if the pens at Yuma into which the cattle were unloaded were properly equipped for rest. The plaintiff in error offered to prove that the feeding and rest pens at Yuma were maintained in as good condition as was customary with railroads in the southwest. For the purposes of this argument it must be assumed such would have been proved if the testimony had not been excluded. And it is urged that it was not for the jury to determine if the pens were properly equipped as provided in the law, in view of the situation presented because of the shipper's assumption of the risk of loss or damage due to heat.

Conclusion.

In conclusion, it is respectfully submitted that the shipper knows, or is presumed to know, that under a contract such as that involved in the present case he must present his claim

for loss or damage within a certain specified time, in this case ten days. If he knows, as Stewart knew in the present case, that his shipment was short five cows when it reached its destination, that is a case of *loss* which is specifically covered by the contract, and there is no possible excuse for his failure to present a written claim within the time prescribed by his contract. If he knows, as Stewart knew in the present case, and says he knew, as abundantly appears from the evidence, without conflict, that the remainder of the shipment had reached its destination in a damaged condition, the fact that the extent of the damage was uncertain and perhaps unascertainable for a time is no better reason for failure to carry out the provisions of the bill of lading. In other words, Stewart knew, according to his own testimony, (Record, p. 84), that when the cattle reached Phoenix five had died, and the others were "in a badly stove-up condition."

It may be assumed that the result of their condition was something which could not then be foretold either by Stewart or by the railroad company. But it is respectfully insisted that it was certainly incumbent upon Stewart to serve notice in the formal way contemplated by the bill of lading, to the effect that the company would be held responsible for whatever damage might accrue to him as the result of its negligence, thus giving to the company the opportunity of investigation, and, to the extent to which it might be permitted so to do, the opportunity of endeavoring to remedy the effects of whatever negligence might be chargeable to the company.

But Stewart made no claim in writing for these uncertain damages, but merely said to the freight agent at Phoenix that he had a claim for damages against the Southern Pacific. That might well have been only for the five cows that had died. He was not definite in that respect, and did not

become definite until October 2, 1913, nearly three months after the arrival of the shipment at destination, when he finally filed a written claim for damage, but which he says even at that time was not fully ascertainable. The fact that some damage had been sustained by the cows that were alive when they reached Phoenix was apparent to Stewart, as he admits, and yet ignoring the bill of lading provision, he submitted no claim therefor until nearly three months later. If he was able to state to the freight agent at Phoenix that he had a claim for damages against the Southern Pacific, he was just as able to comply with the provisions of the bill of lading, and give formal written notice to the Freight Claim Agent of the carrier of the fact that he had such a claim.

Finally, we submit that the carrier, because of a public policy declared by Congress and upheld by this Court, could not waive this requirement in respect of written notice, either by acts, silence, knowledge or acquiescence, nor by solicitous inquiry as to the condition of the live stock, nor by tentative negotiation with the shipper during the ten days within which the latter should have made known his claim to the proper official of the carrier company.

The judgments below should be reversed.

Respectfully submitted,

HENLEY C. BOOTH,
WILLIAM R. HARR,
CHARLES H. BATES,
C. F. R. OGILBY,
Attorneys for Plaintiff in Error.

WM. F. HERRIN,
GUY V. SHOUP,
Of Counsel.

-16-

Office Supreme Court, U. S.
FILED
DEC 20 1918
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

Southern Pacific Company, Plaintiff In Error,
vs.
Frank R. Stewart, Defendant in Error.

No. 89.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR IN REPLY TO BRIEF OF PLAINTIFF IN ERROR.

P. H. HAYES,
Attorney for Defendant in Error.

INDEX.

	Page
Supplemental statement of facts	1
May the carrier waive expressly, or by conduct be estopped to claim the benefits of a clause of a shipping contract inserted therein for its benefit when sued in tort for damage and injury to the shipment arising directly and proximately from the carrier's negligence	9
Under the issues joined and the testimony given the defendant in error was relieved and released from giving notice of the damage to his shipment within ten days	13
Cases cited by plaintiff in error considered	18
The defendant in error assumed the risk of loss or damage due to heat or climatic condition but not loss or damage proximately resulting from negligent acts of the plaintiff in error	22

TABLE OF CASES CITED IN THIS BRIEF.

Page

A. C. Cheney Piano Co. vs. *New York C. & H. Ry. Co.*, 148 N. Y. Supp. 108 12

Adams vs. *Colorado & S. Ry. Co.*, 113 Pac. 1010 17

Banks vs. *Pacific Ry. Co.*, 111 Minn. 48. 12

Boston & Maine R. R. vs. *Piper*, Decided April 15th, 1918. 11

Chesapeake & Ohio Railway Co. vs. *McLaughlin*, 242 U. S. 142. 15

Chicago, R. I. & P. R. R. Co. vs. *Spears*, 122 Pac. 223. 17

Clingan vs. *Cleveland C. C. & St. L. R. R. Co.*, 184 Ill. App. 202. 12

Clubb vs. *St. Louis & S. F. Ry. Co.*, 136 Mo. App. 1. 12

Cockrill vs. *Mo. K. & T. Ry. Co.*, 136 Pac. 322. 17

Cumbie vs. *St. Louis, etc. Ry. Co.*, 105 Ark. 406. 17

Drake vs. *Nashville, etc. Ry. Co.*, 125 Tenn. 627. 17

Eckert vs. *Pa. Ry. Co.*, 211 Pa. 267 12

Frankfurt vs. *Wier*, 83 N. Y. Supp. 112. 12

Harned vs. *Mo. Pac. Ry. Co.*, 51 Mo. App. 482. 12

Hudson vs. *Northern Pacific Ry. Co.*, 92 Iowa 231. 12

Page

Ingwersen vs. *St. Louis & H. Ry. Co.*,
116 Mo. App. 139. 12
Kelly vs. *Southern Ry. Co.*,
84 S. C. 249. 12
L. A. Watkins Merchandise Co. vs. *Mo. K. & T. Ry. Co.*, 72 Kans. 308. 17
McKinstrey vs. *Chicago, etc. Ry Co.*,
153 Mo. App. 546. 17
Missouri, Kansas & Texas Ry. Co. vs. *Harriman Brothers*, 226 U. S. 675. 17
Mo. K. & T. Ry. Co. vs. *Frogley*,
75 Kans. 440. 17
Northern Pacific Railway vs. *Wall*,
241 U. S. 81. 10
Pierson vs. *Northern Pacific Ry. Co.*,
61 Wash. 450. 17
Post vs. *Atlantic Coast Line R. R. Co.*,
138 Ga. 763. 12
Rice vs. *Kansas. P. Ry. Co.*,
63 Mo. 314..... 12
Ridgeway Grain Co. vs. *Pa. Ry. Co.*,
228 Pa. Stat. 641..... 17
St. Louis Southwestern R. R. Co. vs. *Grayson*,
89 Ark. 154..... 12
St. Louis & S. F. Ry. Co. vs. *James*
36 Okla. 196..... 12
Sauls-Baker Co., vs. *Atlantic Coast Line Co.*,
98 S. C. 300..... 12
The Nicet,
134 Fed. 655..... 12
Wabash R. R. Co. vs. *Foster*,
127 Ill. App. 201..... 12
Wallace vs. *Lakeshore & M. S. Ry. Co.*,
133 Mich. 633..... 12

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

Southern Pacific Company, Plaintiff In Error,
vs.
Frank R. Stewart, Defendant in Error.
} No. 89.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR IN REPLY TO BRIEF OF PLAINTIFF IN ERROR.

Believing that it will be for the convenience of and of material aid to the Court in determining the questions involved herein, we quote the language of certain portions of the transcript applicable as a

SUPPLEMENTAL STATEMENT OF FACTS.

The Plaintiff in error, among other defenses pleaded to defendant in error's cause of action, pleaded the non-compliance on the part of defendant in error with the ten days' notice provision in the shipping contract,

(Transcript, pages 35 to 36 inclusive). To this defense the defendant in error replied in the following language:

> "Further replying, plaintiff admits that said shipping contracts entered into between plaintiff and his agents and the defendant, contain a proviso that in case any loss or damage should be sustained for which the defendant might be liable, that plaintiff would make demand or claim therefor in writing, to the freight claim agent of the defendant, within ten days after the unloading of said cattle at Phœnix, Arizona, and that said contracts contain the further proviso that in the event of the failure of the plaintiff so to do, all claims for losses and damages in the premises, were waived released and made void, but this plaintiff denies that he assented to the terms of said proviso or either of them.
>
> "Plaintiff admits that said cattle were unloaded and received by him on the 5th day of July, 1913, at the city of Phœnix, and admits that he did not nor did any person else, to plaintiff's knowledge, or on his behalf, make demand or claim in writing within said ten day period, to the freight claim agent of the defendant, or to the defendant or to any agent of the defendant for the loss or damage sustained by him in said shipment; and
>
> "Further replying, plaintiff denies that it was entirely possible or at all possible for him to have given such notice in writing or at all, to the defendant or to its agents within said ten day period, after the unloading of said cattle, for the reasons hereinafter more fully set forth; and further replying, plaintiff denies that by reason of his failure or the failure of any person for him or on his behalf, to make such claim in writing within ten days after the unloading of said cattle, he

waived or released all or any portion of his said claims against the defendant on account of the loss or damage to his said shipment, as set forth in his said complaint

"Further replying, plaintiff alleges that on the 4th day of July, 1913, and at all times subsequent to the arrival of said cattle at the station of Yuma, Arizona, the defendant had full knowledge and notice of the injuries and damage to plaintiff's cattle as set forth in his said complaint; that said cattle were unloaded by the defendant into its stock-pens at the station of Yuma, between the hours of nine and ten o'clock A. M., on the 4th day of July, 1913, and between said date and the hour of 7:30 P. M., of said day, and prior to the reloading of said cattle into the defendant's cars, five of said cows died; that said cattle remained in the defendant's stock-pens at Yuma from about the hour of 10:30 A. M. of said 4th day of July, 1913, to 7:30 P. M., of said day, without any shelter or protection whatsoever from the intense heat of the sun, and were nursed and cared for during said entire period by the defendant's agents, assisted by one James Ford; that upon loading said cattle it became necessary to provide, and the defendant did provide, an additional car in which to ship thirteen of the sick and crippled cattle of the plaintiff to their destination at Phœnix, that at various points between the said station of Yuma and the city of Phœnix, the train officials in charge of said shipment, received telegraphic inquiries from other officials of the defendant, inquiring as to the condition and welfare of said shipment, that upon the arrival of said shipment at Phœnix, Arizona, one of said crippled animals remained in defendant's car for a period of more than a week, and that immediately after the unloading of said shipment at Phœnix, Arizona, and almost daily from

said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizon Eastern Railroad Company and of this defendant, were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the one hundred and forty-seven (147) head of plaintiff's cows which arrived at the destination alive, were such as to render it impossible for this plaintiff or any person else in the exercise of due care and diligence, to determine the amount and extent of damage sustained by the plaintiff, within said ten-day period; that a number of said cattle died many days after their arrival at Phœnix, Arizona, as the result of said injuries.

"That on or about the 21st day of October, 1913, and after repeated efforts to arrive at any determination with the defendant and its delivering carrier, as to the extent and amount of damages sustained by the plaintiff, the plaintiff made demand in writing upon the defendant for the sum of Fifteen Hundred and Seventy Dollars ($1,570) in satisfaction of the damages accrued to him at that time by reason of the acts of negligence set forth in his complaint, which said demand was refused. That thereafter and on, to wit, the 15th day of December, 1913, and as soon as plaintiff was able to ascertain the nature and extent of the injury and damage to his cattle as set forth in his complaint, he again made written demand upon the defendant for the sum of Twenty-six Hundred and Ninety-five Dollars ($2,695) in full satisfaction of the damage and injuries sustained by him in the manner set forth in his said complaint, which demand was refused.

"Further replying, plaintiff alleges that defendant has repeatedly waived the requirements on the

part of plaintiff that he make said demand in writing within said ten day period, in this, to wit, that defendant has on many occasions prior to the 21st day of October, 1913, recognized plaintiff's right to a recovery in some amount on account of his damages sustained as set forth in his said complaint, and has on many occasions attempted to settle and compromise said claim with the plaintiff; that subsequent to the giving of the notice in writing on the 21st day of October, 1913, and the 15th day of December, 1913, as above set forth, defendant has attempted on two different occasions through its claim agents, to adjust with plaintiff the loss and damage sustained by him as set forth in his said complaint." (Transcript, pages 62 to 65 inclusive.)

The following quotation from the testimony of defendant in error which was in practically all material respects corroborated by the testimony of the witness James Ford (Transcript, pages 88 to 92 inclusive) and that of witness Frank H. Whitten (Transcript, pages 97 to 101 inclusive) illustrates the character of testimony introduced in support of defendant in error's reply above quoted:

". . . We arrived at Yuma about nine o'clock in the morning of the 4th of July, 1913, Pacific time. I went up to the office and the agent asked me, 'Are you going to unload?' and I said, 'No, I am going through.' And he said, 'Well, I will have to see about that.' In a few minutes he said to me, 'You will have to unload.' I said, 'I am not going to unload these cattle here; if you unload them, you will kill every head of cattle I have got. The cattle are cool. They are still in good shape. I

don't propose to unload the cattle here in these sand pens.' There is no shade there whatever. The stock-pens at Yuma were sand dunes with a fence around them, where the cattle had been trampling manure into the sand for years. It was hot as an oven. There was no shade at all. No trees. I said to the agent, 'If you unload the cattle you unload them at your own risk,' and he took the cattle out of my hands and unloaded them, and I left and went up town. Possibly an hour was consumed in our conference and argument with the agent with respect to unloading. Neither myself nor my men had anything to do with the unloading. I did not go back to the stockyards where the cattle were until along about five o'clock, and found that five of the cattle had died, and the others were in pretty bad shape. They seemed to be stiffened up. The cattle were reloaded at Yuma at about half-past seven into six cars. We loaded the first five cars, and we had thirteen cripples in a separate pen that the railroad company furnished an extra car to load them into. The cattle, when they left San Luis Obispo were in very good flesh. Some of them were quite fat. The cows that died at Yuma were the fattest ones. They were overcome with the heat. The shipment arrived at Phoenix on the fifth of July, about one o'clock in the afternoon. The cattle when they arrived at Phoenix were in a badly stove-up condition from the effects of the heat. I had trouble getting them out to the pasture. Several of them staggered all the way up the road. We left one of the animals in the car. We could not get her out. The majority of the cows were milking at the time we shipped them. We milked them at Los Angeles. The shipment of the cows stopped the flow of milk on some, and some of them did not give more than

half what they were giving. There were five others died here after arrival. . . . Within three or four days after the arrival of the shipment at Phoenix the matter of my claim for damages was taken up with the Arizona Eastern Railroad. The Southern Pacific people did not say anything to me about paying the freight on the cattle, because I told them I would not pay the freight and two or three days afterwards a man from their office came to see me and I told him I would not pay the freight on the cattle until our damages was adjusted and then he came to see me three or four times after that. I first presented a claim in writing to the agent of the Arizona Eastern and the Southern Pacific Company for damage I think on the second of October. At that time I had not ascertained the whole extent of my damage. I lost some of the cattle after that. I think I next made a claim in writing in the early part of December for loss of eleven head at eighty-five dollars a head and damages to eighty-seven head at twenty dollars a head and twenty dollars that I paid for care of the cattle. Some of the cattle died after December. (Transcript, pages 83 to 86 inclusive.)

The language of the Ninth Circuit Court of Appeals' opinion to which plaintiff in error's assignments of error primarily relate, is the following:

"The defendant urges that the court below erred in refusing to charge as requested that the plaintiff could not recover for any loss or damage to the cattle, for the reason that he failed to make written demand on the defendant within ten days after unloading at the final destination, when he knew of all the damage to the cattle, or could, by the exercise of reasonable diligence have known

the same. The requested instruction was in accordance with the defense pleaded in the defendant's answer. To that defense the plaintiff had replied that he was relieved from compliance with the provisions as to notice in writing within ten days by the facts that on July 4, 1913, and at all times subsequent thereto, the defendant had full knowledge and notice of the injuries and damages to the plaintiff's cattle; that prior to reloading the cattle on that day, five of them had died, that the defendant found it necessary to provide an additional car in which to reload thirteen of the crippled and sick cattle, that at various points between Yuma and Phoenix the train officials in charge of the shipment received telegraphic inquiries from other officials of the defendant inquiring as to the condition and welfare of the cattle, that after arrival at Phoenix, one of the crippled animals remained in the defendant's car for more than a week, that from the unloading of the shipment at Phoenix, until October 21st of that year, the plaintiff and the agents of the defendant and its connecting carrier were almost daily in communication relative to the damages sustained by the plaintiff, that the nature and extent of the injuries to the cattle which arrived alive were such as to render it impossible to determine the amount and extent thereof within the ten-day period, that a number thereof died many days after their arrival at Phoenix, as the result of such injuries, and that the defendant on many occasions prior to October 21st recognized the plaintiff's right to recover on account of his damages. There was proof tending to sustain all the facts so alleged in the reply. We think, therefore, that the court below committed no error in instructing the jury that in view of the evidence, if they found it to be true, the plaintiff was relieved and released from

giving notice within the ten days. Cockrill *vs.* Missouri, K. & T. Ry. Co., 136 Pac. 322, and cases there cited; Pierson *vs.* Northern Pac. Ry. Co., 61 Wash. 450; Chicago, R. I. & P. Ry. Co. *vs.* Spears, 122 Pac. 228; Missouri, K. & T. Ry. Co. *vs.* Frogley, 75 Kan. 440; Adams *vs.* Colorado & S. Ry. Co., 113 Pac. 1010."

MAY THE CARRIER WAIVE EXPRESSLY, OR BY CONDUCT BE ESTOPPED TO CLAIM THE BENEFITS OF A CLAUSE OF A SHIPPING CONTRACT INSERTED THEREIN FOR ITS BENEFIT WHEN SUED IN TORT FOR DAMAGE AND INJURY TO THE SHIPMENT ARISING DIRECTLY AND PROXIMATELY FROM THE CARRIER'S NEGLIGENCE?

The above seems to us a more precise statement of the proposition relied upon by the plaintiff in error and is more directly in keeping with the issues joined. The general proposition is so well established in the law as to require no comment or citation of authorities that a party to a contract may waive expressly or by conduct be estopped to assert any provision made therein for his benefit. The 10-day provision in the live stock shipping contract in question was inserted therein by the plaintiff in error solely for its benefit and protection. It is in fact a forfeiture clause directed against the shipper. Its purposes among others are doubtless to enable the carrier to make prompt investigation as to the merits of any claim for loss or damage arising either through breach of contract on its part or through tort, while the best evidence is obtainable by it; it is designed, among other things, to avoid dishonest or fraudulent claims against it; it

doubtless has for its ultimate purpose and design the limiting of its liability to the shipper for its breach of contract or negligent acts. To adopt the reasoning and logic of Mr. Justice McReynolds in his dissenting opinion in *Northern Pacific Railway* vs. *Wall*, 241 U. S. 81:

> "The bill of lading itself is an elaborate document bearing on its face evidence of care and deliberation in the formation of conditions of the liability of the companies issuing it. The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the conditions should be construed most strongly against the companies because their officers or agents prepared the instrument, and if the court is to interpret such language it is, as stated by Mr. Justice Harlan in delivering the opinion of the court in First National Bank *vs.* Hartford Fire Ins. Co., 95 U. S. 673, 'both reasonable and just that its own words should be construed most strongly against itself.' "

If the interpretation placed by counsel upon this clause were to be accepted it would in many cases not only limit the carrier's liability for its breach of contract or negligent acts but would on the other hand entirely defeat recovery by the shipper. It is elementary that a carrier may not by contract absolve itself entirely from the consequences of its negligent acts.

We do not accept either the proposition or the reasoning of counsel that it is "utterly incompetent" for a carrier to waive such provision in a shipping

contract when an attempt is made to enforce a common law right against it for negligence, nor can we read in the opinions of this court any express or implied assent to such a proposition. It is true that this court has interpreted clauses in shipping contracts affecting the carriers and shippers *as a class* as being binding upon both, but we cannot assent to the reasoning that this court has at any time placed such construction upon a contract which does not affect a class of carriers or shippers. Counsel assert that the clause in question is immutable on the part of both the carrier and the shipper for reasons of public policy. As above stated, it has always been contrary to public policy that a carrier may entirely absolve itself from liability for its negligent acts. It is likewise true that forfeitures are not favored in law, and courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture or an agreement to do so. Counsel assume that solely by virtue of the fact that the shipping contract in question was filed with the Interstate Commerce Commission no provisions thereof, even those made for its own benefit, may be waived by it. We cannot admit that a clause in a shipping contract inserted for the sole benefit of the carrier and enforced upon a shipper (there being in such provision at least a lack of that mutuality common to contracts) has any added force or magic by virtue of its having been filed with the Interstate Commerce Commission. Mr. Justice Day, speaking for the Court in *Boston & Maine R. R.* vs. *Piper,* decided April 15, 1918, says:

> "While this provision was in the bill of lading the form of which was filed with the railroad company's tariffs with the Interstate Commerce Commission it gains nothing from that fact."

Had the contract in question entirely omitted the notice provision when filed with the Interstate Commerce Commission it would have been just as binding upon the carrier. Congress in passing the Hepburn Act had in mind the preventing of the discrimination of the carrier in favor of certain shippers. We are quite certain it did not have in mind that carriers would be wilfully negligent with the handling of shipments and would thereafter discriminate between shippers in its payment of damages, for such negligent conduct, nor has it been our experience and observation that carriers freely admit negligence when alleged against them but on the contrary resist such charges by every means possible until established by the shipper to the satisfaction of the court and jury.

The following are a few of the many decisions of our State Supreme Court holding that a party may waive a contract provision inserted therein for his benefit and are selected as illustrative of the various acts held to constitute a waiver: *Post* vs. *Atlantic Coast Line R. R. Co.*, 138 Ga. 763; *Kelly* vs. *Southern Ry.*, 84 S. C. 249; *A. C. Cheney Piano Co.* vs. *New York C. & H. Ry. Co.*, 148 N. Y. Supp. 108; *St. Louis Southwestern R. R. Co.* vs. *Grayson*, 89 Ark. 154; *Hudson* vs. *Northern Pacific Ry. Co.*, 92 Iowa 231; *Harned* vs. *Mo. Pac. Ry. Co.*, 51 Mo. App. 482; *Ingwersen* vs. *St. Louis & H. Ry. Co.*, 116 Mo. App. 139; *Frankfurt* vs. *Wier*, 83 N. Y. Supp. 112; *Banks* vs. *Pacific Ry. Co.*, 111 Minn. 48; *Wallace* vs. *Lake Shore & M. S. Ry. Co.*, 133 Mich. 633; *Sauls-Baker Co.* vs. *Atlantic Coast Line.*, 98 S. C. 300; *Eckert* vs. *Pa. Ry. Co.*, 211 Pa. 267; *Wabash R. R. Co.* vs. *Foster*, 127 Ill. App. 201; *St. Louis & S. F. Ry. Co.* vs. *James*, 36 Okla. 196; *Clubb* vs. *St. Louis & S. F. Ry. Co.*, 136 Mo. App. 1; *Rice* vs. *Kans. P. Ry. Co.*, 63 Mo. 314; *Clingan* vs. *Cleveland C. C. & St. Louis R. R. Co.*, 184 Ill. App. 202; *The Nivet*, 134 Fed. 655.

UNDER THE ISSUES JOINED AND THE TESTIMONY GIVEN THE DEFENDANT IN ERROR WAS RELIEVED AND RELEASED FROM GIVING NOTICE OF THE DAMAGE TO HIS SHIPMENT WITHIN TEN DAYS.

This was the principal issue in the court below. The court has already seen from the supplemental statement of facts that the defendant in error pleaded by way of reply that under the facts set forth in his reply he was relieved and released from giving the ten days' notice provided in his contract. Both the District Court and the Ninth Circuit Court of Appeals found that there was proof tending to sustain all the facts alleged in the reply and that by reason of the issues made and the proof of them it was not error to instruct the jury that if they found the evidence to be true they might further find that the defendant in error was relieved from giving the notice within ten days. We believe the Ninth Circuit Court of Appeals' decision upon the question was in no respect inconsistent with the opinion of this court in the cases cited by plaintiff in error, a number of which decisions were rendered subsequently to the opinion of the Ninth Circuit Court of Appeals in this case.

We take it that this court has established that the interpretation of these contract provisions presents a Federal question. We do not take it that this court has by any opinion heretofore rendered attempted to establish the rule of interpretation or an interpretation applicable to all questions that may be presented to it upon these notice provisions. As we understand the opinions of the court it has reserved to itself the right to interpret every such provision as it arises upon the

facts of the particular case. The provision should be held reasonable or unreasonable, as the facts surrounding the shipment make it reasonable or unreasonable or practicable or impracticable. In the present case was it practicable or at all possible for the defendant in error to comply with the provisions? The testimony established that it was utterly impossible for him to know the extent of his loss and damage within the ten day period, the testimony showing that some of the injured cattle died as late as December following. We call the court's attention particularly to the language of the provision relied upon. It is not a provision for notice of loss or damage, or to be more exact, is not notice to the carrier that a claim will be filed for loss or damages, the provision is:

> "Second party hereby further agrees that in case any loss or damage shall have been sustained for which first party is liable demand or claim for such loss or damage will be made on the freight claim agent of first party in writing within ten days after unloading of the live stock; and that in event of failure so to do all claims for loss or damages in the premises are expressly waived, released and made void."

To have complied with this provision, the defendant in error must have presented a Claim or Demand for his loss and damage within ten days. This the court will readily see under the testimony was an impossibility as the loss and damage had not at such time been ascertained. To have presented a Claim or Demand in any amount would have been unjust either to the carrier or shipper,—unjust to the shipper in the event his claim was smaller than his actual damage, and un-

just to the carrier in the event it exceeded his actual loss and damage. He could not honestly make claim or demand until he had ascertained the extent of his loss and damage. As heretofore suggested, the clause was inserted by the carrier for his benefit and should be strictly construed, in order to prevent, if possible, a forfeiture by the shipper. We are assuming in this argument that certain facts and circumstances will relieve the shipper from compliance with the provision. To assume that no facts or circumstances would relieve the shipper from such compliance would be to enforce a forfeiture against him, and would also have the effect in many cases of relieving the carrier entirely from liability for its negligence. Let us suppose, by way of illustration, that in the present case the shipper was seriously injured while accompanying his shipment, through negligent act of the carrier, and was by such injuries rendered mentally and physically incapable of looking after his shipment for a period of thirty to sixty days. Can it be assumed that the carrier under such circumstances could rely upon the ten days' provision and enforce a forfeiture of the shipper's right? In the present case the carrier's negligent acts were such as to make it impossible for the shipper to comply with his part of the contract in the giving of the notice within ten days. It is a well established principle of contracts that where a party by his own act has rendered compliance with the provision of the contract by the other party impossible, that party will be excused. This court, it seems to us, has held in the *McLaughlin* case cited by plaintiff in error that circumstances and conditions may arise which will excuse non-compliance with this provision. Mr. Justice McReynolds, speaking for the court in that case says:

"Upon its face the agreement seems to be unobjectionable and NOTHING IN THE RECORD TENDS TO ESTABLISH CIRCUMSTANCES RENDERING IT INVALID OR EXCUSE FAILURE TO COMPLY THEREWITH." (Caps are ours.)

Boston & Maine R. R. Co. vs. *Piper, supra,* was an action brought by the defendant in error to recover damages for loss occasioned by delay in delivering cattle as a result of the negligence of the plaintiff in error. The court held the provision of the live stock shipping contract limiting the carrier's liability to be unreasonable and void, notwithstanding the fact that it was duly filed with the Interstate Commerce Commission, indicating clearly, as we believe, the right reserved by the court to pass upon the reasonableness or the unreasonableness of any particular clause in a shipping contract, measured by the circumstances and conditions surrounding the particular shipment. The language of the court in this case is as follows:

"In the bill of lading, now under consideration, there is an express agreement limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water for his stock while so detained. This stipulation contravenes the principle that the carrier may not exonerate itself from losses negligently caused by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amount of recovery, but are in effect attempts to limit the carrier's liability for negli-

gence by a contract which leaves practically no recovery for damages resulting from such negligence. While this provision was in the bill of lading, the form of which was filed with the railroad company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact."

In the case of *Missouri, Kansas & Texas Ry. Co.* vs. *Harriman Brothers*, 227 U. S. 675, the court, speaking through Mr. Justice Lurton, says:

"The liability imposed by the statute is the liability imposed by the common law upon a common carrier and may be limited or qualified by special contract with the shipper provided the limitation or qualification be just and reasonable and does not exempt from loss or responsibility due to negligence."

In each of the following cases the court held that these notice clauses in shipping contracts are to be given a reasonable construction, so as to effect rather than to defeat the purpose of the contract, and in each of the cases cited the court held that the shipper under the circumstances was excused from giving the notice in writing of his loss and damage: *Cockrill* vs. *Mo. K. & T. Ry. Co.*, 136 Pac. 322; *Pierson* vs. *Northern Pacific Ry. Co.*, 61 Wash. 450; *Chicago, R. I. & P. R. R. Co.* vs. *Spears*, 122 Pac. 223; *Mo. K. & T. Ry. Co.* vs. *Frogley*, 75 Kans. 440; *Adams* vs. *Colorado & S. Ry. Co.*, 113 Pac. 1010; *L. A. Watkins Merchandise Co.* vs. *Mo. K. & T. Ry. Co.*, 72 Kans. 308; *McKinstrey* vs. *Chicago, etc. Ry. Co.*, 153 Mo. App. 546; *Cumbie* vs. *St. Louis, etc. Ry. Co.*, 105 Ark. 406; *Drake* vs. *Nashville, etc. Ry. Co.*, 125 Tenn. 627; *Ridgeway Grain Co.* vs. *Pa. Ry. Co.*, 228 Pa. Stat. 641.

CASES CITED BY PLAINTIFF IN ERROR CONSIDERED.

The *Phillips* case was an action to recover an indebtedness due the plaintiff on account of overcharges by the defendants for the shipment of certain lumber from points in Alabama to Fenton, Mich. The unreasonableness of the rate had been established by another corporation, the Yellow Pine Association, in a complaint made before the Interstate Commerce Commission, whose findings were sustained by the Circuit Court of Appeals and by this court. No act of negligence was involved so far as the record discloses and the language of the court, quoted by plaintiff in error, was in the construction of the following provision of the Hepburn Act:

> "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after, and the petition for an enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after, provided that claims accruing prior to the passage of this Act may be presented within one year."

The overcharges were made and paid prior to August, 1904, suit was brought in May, 1909, less than two years after the validity of the Commission's order was sustained by this court and more than one year after the passage of the Hepburn Act and more than four years after the plaintiff's cause of action arose. The above provision, it is clear, was enacted by the

Congress for the purpose of preventing discrimination by the carriers on behalf of shippers, and the language from the opinion quoted by the plaintiff in error was clearly in keeping with the purpose and intent of the act. The provision interpreted affected carriers and shippers as a class and it was just that the carrier be not permitted to waive the statute of limitations in behalf of one shipper and enforce it as against another.

In the *Blish Milling Company* case, so far as we can ascertain the facts from the court opinion, waiver was not relied upon nor were there any circumstances or conditions excusing the giving of the notice as provided in the bill of lading. The defendant in error relied upon the inapplicability of that provision as a defense, so that without determining either of these questons the court found that notice had in fact been given in the form of a copy of a telegram introduced in evidence without objection on the part of the plaintiff in error. In that case the court used the following language:

> "Granting that the stipulation is applicable and valid it does not require documents in a particular form. It is addressed to a practical exigency and it is to be construed in a practical way."

We now ask, did the exigencies of the present case permit of the making of claim and demand for loss and damage within ten days?

In the *Prescott* case no testimony nor circumstances were developed that would excuse compliance with the notice provision nor were any facts or circumstances developed that would show a waiver by the carrier of the provision. The plaintiff in error was sued as warehouseman under the laws of the State of Georgia, and

the warehouseman's liability as such was sought to be established. This court held that the contract set forth in the bill of lading was in force and afforded the measure of liability of the carrier, if any. The case was not a negligence action.

In the *Wall* case, so far as the facts are disclosed, there were no circumstances tending to excuse or render it impossible to give the required notice in writing. It is conceded on the other hand that no notice, written or oral, was given or attempted to be given, and the excuses made by the shipper for his failure to give such notice appears to have been that the contract provided that a notice was to be given to an officer or station agent of the initial carrier. The court held that the clause would have been complied with by giving notice to the terminal carrier.

In the *McLaughlin* case again it appears that no notice was given or attempted to be given and no circumstances appear to excuse the shipper or to render it impracticable for him to give the notice, in fact there was no appearance in this court for the defendant in error and the court was obliged to construe the clause in question without the aid of any facts other than the shipping contract itself. It is pertinent here to note that the court expressly found that there was nothing in the record tending to establish circumstances rendering the notice invalid or excusing the failure to comply with it.

In the *Starbird* case it will be seen that it was only necessary that Starbird should give notice to the carrier that he would make a claim for damages. It did not require, as in the present case, that he make claim and demand for his damages. We quite agree with the court's view that it was entirely reasonable

and possible for the shipper to have notified the freight agent that his shipment had been damaged and that he would present a claim therefor. It appears that the delivering carrier had a freight agent at the place of delivery and in charge of the dock upon which the peaches were delivered. It further appears that Starbird knew within a very few hours after the receipt of this shipment that he had a damaged shipment and it was but fair that he so notify the freight agent that an investigation might be made by him as to the justice of the claim which he would later make. It further appears in this case that no attempt watever was made to give notice in writing and no facts or circumstances were developed to show that the carrier waived the giving of such notice. In the instant case the plaintiff in error was in possession of numerous facts relative to the injuries to the shipment in queston, was in negotiations with the defendant in error practically every day following the delivery of the shipment, was therefore put completely upon its notice that damages were being claimed and had every opportunity that was open to the shipper to ascertain for itself the extent of the loss and damage. We take it that the phrase *Claim or Demand* is used in a legal sense, and that it means exactly what it says, viz: that the shipper must make claim and demand for the actual amount of the damages by him sustained. We do not believe that the provision would have been at all complied with by merely giving the plaintiff in error notice in writing that he would make claim and demand for damages when he had ascertained the extent of his loss.

In the *Stone* case it was conceded that no written claimed was filed within the time specified and so far as the facts disclosed, no excuses were offered for fail-

ure to file claim within a specified time. In that case, as in the *McLaughlin* case, there was no appearance on behalf of defendant in error whatsoever. It is apparent, therefore, that neither the question of waiver nor of circumstances excusing the failure to give the required notice were raised.

THE DEFENDANT IN ERROR ASSUMED THE RISK OF LOSS OR DAMAGE DUE TO HEAT OR CLIMATIC CONDITION BUT NOT LOSS OR DAMAGE PROXIMATELY RESULTING FROM NEGLIGENT ACTS OF THE PLAINTIFF IN ERROR.

The damage sustained by defendant in error was the direct result of the negligent acts of the plaintiff in error, as herein above set forth. That defendant in error's damage was not due to a climatic condition over which the plaintiff in error had no control is conclusively shown, we believe, by the undisputed testimony that all the cattle arrived at Yuma in good condition. They were shipped in open properly ventilated cars which would protect them from the rays of the sun and at the same time afford free passage of air through the cars. It is to be presumed therefore that had the shipment moved forward in keeping with the shipper's instructions, the protection accorded the cattle by the cars, together with the circulation of air created by the motion of the train would have fully protected the cattle from injury. Had the cattle succumbed to heat while in transit in the plaintiff in error's cars and without any negligence upon the part of plaintiff in error the result would have been a loss due to natural causes; but where the loss was occasioned,

as in this case, THROUGH AN INTERVENING NEGLIGENT ACT ON THE PART OF THE PLAINTIFF IN ERROR AS THE PROXIMATE CAUSE OF THE INJURY AND DAMAGE it cannot be successfully maintained that the damage was due to causes beyond the control of the plaintiff in error.

Respectfully submitted,

P. H. HAYES,
Attorney for Defendant in Error.